82-1461

No. 82-

In the

Supreme Court of the United States

OCTOBER TERM, 1982

LARRY D. JONES,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an Illinois arrest warrant has any extra-territorial effect so that federal law enforcement officers may rely upon it and enter a motel room in Indiana without otherwise obtaining a warrant as required by *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981)?

2. Whether federal law enforcement officers may employ a ruse in entering a motel room to make an arrest and thereby avoid the necessity of obtaining a warrant as otherwise required by *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981)?

3. Whether Rule 41(c)(2) of the Federal Rules of Criminal Procedure is mandatory and requires federal law enforcement officers to obtain a telephonic search warrant when they do not have time to obtain a warrant by appearing personally before a magistrate?

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v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Larry D. Jones respectfully petitions the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on December 14, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 696 F.2d 479. It appears in the Appendix at pages A-3 through A-26. The judgment of the Court of Appeals, which was also entered on December 14, 1982, appears at page A-2 of the Appendix. It was stayed pending certiorari pursuant to an order entered on February 3, 1983.

The order of the Court of Appeals denying petitioner's request for rehearing and suggestion for rehearing *en banc* appears at page A-1.

The judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, was entered on November 11, 1981, and is unreported. It appears at page A-27.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit were entered on December 14, 1982. On January 21, 1983, the Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc*.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). This petition is timely filed on March 4, 1983, pursuant to Supreme Court Rules 20.1 and 20.4.

CONSTITUTIONAL PROVISIONS AND RULES OF PROCEDURE INVOLVED

The Fourth Amendment to the United States Constitution reads, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Rule 41(c)(2)(A) of the Federal Rules of Criminal Procedure states:

> "General Rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal Magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to 18 U.S.C. §3231, in that petitioner was charged with an offense against the laws of the United States.

In July of 1981, an unnamed informer advised Special Agent Frank Waldrup of the Illinois Division of Criminal Investigation that Douglas Nisbet would be in the vicinity of Crawfordsville, Indiana, on July 26-28th with a large quantity of cocaine. (Affidavit for search warrant, paragraph 7, Appendix, p. A-36; Transcript, pp. 66, 87.) Nisbet was wanted on criminal charges in Illinois, and Illinois had issued a fugitive warrant for his arrest. (Affidavit for search warrant, paragraphs 4-6, Appendix, pp. A-36 and A-37.)

On July 24th, Special Agent Waldrup called James J. McGivney, a special agent with the Federal Drug Enforcement Administration in Indianapolis, Indiana. (Transcript, p. 11.) He told Agent McGivney what he had been told by the informer and stated that he had an Illinois fugitive warrant for Nisbet's arrest. (Affidavit for search warrant, paragraphs 2-7, Appendix, pp. A-36 and A-37; Transcript, pp. 12-13.)

On July 27th, Agents Waldrup and McGivney took eleven agents and officers to the Holiday Inn at Crawfordsville, Indiana. (Transcript, pp. 16-17.) They went to the motel manager's office and learned that a party of two persons was registered under the name of "L. Jones" from Sunrise, Florida, and had been assigned to room 150. (Transcript, pp. 19-20.) They also observed a person near the swimming pool who met Nisbet's description. (Transcript, pp. 17-18, 83.) They kept this person under surveillance and watched him enter room 150 at approximately 1:10 or 1:15 p.m. (Transcript, pp. 37, 59.)

At about 1:30, one of the investigating agents dressed as a "bus boy" and entered Room 150 on the pretext of delivering an order of food. (Transcript, pp. 21-22.) At 3:30,

the agent returned and talked with Nisbet, who opened the door slightly. (Transcript, pp. 63-65.) At 5:30, the agent returned to the room for a third time. He again pretended to be a "bus boy" and asked for the food tray. (Transcript, pp. 22-23, 67-68, 87-88.) When Nisbet opened the door, he was confronted by several agents. Agent McGivney fired a shotgun blast and at least four agents entered the room. (Transcript, pp. 68-70, 399, 477.)

Both Nisbet and the petitioner were arrested and removed from the room. (Transcript, pp. 103, 120.) Thereafter, the agents walked through the room, took some powder out of a sack, and conducted a chemical test on the powder. (Transcript, pp. 71-72, 188, 288, 293.) The room was secured, and approximately four hours later Agent McGivney obtained a warrant to search it for evidence and contraband. (Transcript, pp. 8-9, 74, 297-98, 406-407.)

On August 3rd, an indictment was filed in the United States District Court for the Southern District of Indiana, Indianapolis Division, charging the two men with conspiracy to possess cocaine with intent to distribute it [21 U.S.C. 841(a)(1) and 846] and with the possession of cocaine with intent to distribute it [21 U.S.C. 841 (a)(1)].

On September 1st, the petitioner moved to suppress the evidence seized at the time of his arrest. (Appendix, pp. A-28 to A-30.) The district court found that the evidence was seized lawfully and denied the motion. (Findings of Fact, No. 4 and 5, Appendix, pp. A-42 to A-45.) The petitioner was later convicted on both counts. On November 24th, he was sentenced to serve concurrent terms of two years on each count to be followed by a special term of parole for three years.

The petitioner then prosecuted an appeal to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed his convictions and entered its judgment on December 14, 1982. A timely petition for a rehearing with a suggestion for a hearing *en banc* was

denied on January 21, 1983. The petitioner then moved for a stay of the mandate pending certiorari, which was granted on February 3, 1983.

REASONS FOR GRANTING THE PETITION

I

The Decision of the Court of Appeals Conflicts with the Warrant Requirements of *Payton v. New York* and *Steagald v. United States* by Erroneously Assuming that an Illinois Arrest Warrant May be Used to Justify an Entry Into a Motel Room Located in Indiana.

In *Payton v. New York*, 445 U.S. 573 (1980), this Court held that law enforcement officers must have a warrant to enter a person's home to arrest him. In *Steagald v. United States*, 451 U.S. 204 (1981), the Court held that the officers must have a search warrant in order to enter a home to arrest someone other than the owner.

In the case at bar, federal law enforcement officers entered the motel room occupied by Douglas Nisbet and the petitioner without any warrant whatsoever. This entry and the ensuing arrests were therefore illegal under *Payton* and *Steagald* because the motel room occupied by Nisbet and the petitioner was the same as their home for Fourth Amendment purposes. *Stoner v. California*, 376 U.S. 483 (1964); *United States v. Griffith*, 537 F.2d 900, 905 (7th Cir. 1976).

In the district court, the government conceded that a warrant was necessary but then argued, without citing authority, that the Illinois fugitive warrant for Douglas Nisbet satisfied this requirement. *See, Brief in Support of Government's Response to Douglas Nisbet's Motion to Suppress*, pp. 1, 3; *Brief in Support of Government's Response to Defendant Larry Jones' Motion to Suppress*, p. 2. This position, however, is contrary to the fundamental

principle that warrants cannot be executed outside the territorial limits of the jurisdiction in which they are issued. *See, generally,* 6A Corpus Juris Secundum, *Arrest,* §53, p. 124; and 1 Wharton's *Criminal Procedure,* §59, p. 158.

Nonetheless, the government relied exclusively upon the Illinois warrant to justify the entry. For example, the government's brief in the trial court stated the following:

> "* * * In applying these criteria to the case at bar, it is obvious that the seizure of the items observed in Nisbet's motel room even at the time of his arrest would have been proper since McGivney's intrusion was based on an outstanding warrant for Nisbet. McGivney had no probable cause to believe contraband was present in Nisbet's room prior to the arrest* * *." *Brief in Support of Government's Response to Defendant Douglas Nisbet's Motion to Suppress,* p. 4.

A similar statement appears in the government's response to the petitioner's motion to suppress. *Brief in Support of Government's Response to Defendant Larry Jones' Motion to Suppress,* p. 2. The latter brief, however, continues with the following statement:

> "The Government concedes that McGivney did not have the consent of Jones and Nisbet to enter the room. * * * The entry, occurring only in connection with effecting Nisbet's arrest, was lawful and evidence seen and later seized does not warrant suppression." *Id.,* p. 2.

On appeal to the Seventh Circuit, the government changed its position and asserted that the federal agents acted as private citizens in executing the Illinois arrest warrant and entering the motel room occupied by Nisbet and the petitioner. As stated in its brief submitted to the Court of Appeals,

> "* * * It is the existence of these unexecuted Illinois

warrants that provided the probable cause for Nesbit's arrest at the Crawfordsville, Indiana, Holiday Inn on July 28, 1981. Absent a federal statute authorizing Drug Enforcement Administration officers to make arrests on fugitive warrants from the separate states, applicable state law applies. Under Indiana law, at the time of Nesbit's arrest McGivney, as a citizen, was empowered to make the arrest. As stated in *United States v. Hellsman*, 522 F.2d 454 (7th Cir. 1975),

> Indiana follows the general common law rule that 'a private citizen has the right to arrest one who has committed a felony in his presence, and may even arrest one he reasonably believes to have committed a felony, so long as the felony was in fact committed * * *. A private citizen * * * is privileged to make an arrest only when he has reasonable grounds for believing in the guilt of the person arrested and a felony was *in fact* committed.

Consequently, Agent McGivney, as a private citizen, could effect the arrest but did so at his own peril." *Brief of Plaintiff-Appellee*, p. 14.

Despite this change of position, the Court of Appeals apparently concluded that the Illinois warrant was sufficient to justify the entry of the federal agents into the Indiana motel room. Without commenting on the government's novel theory that a federal agent could act as a private citizen in executing a foreign arrest warrant, the court simply concluded that the rights of the defendants were not violated "because the agents relied upon existing arrest warrants when they approached room 150." 696 F.2d at 486-487; Appendix, p. A-12.

This Court has repeatedly recognized the importance of protecting a person's fundamental Fourth Amendment right to be protected from an unreasonable invasion of his home or place of abode. As stated in *Payton v. New York*,

> "* * * The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their...houses...shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' * * *." 445 U.S. at 589-90.

The Court should grant certiorari here to address the important question of whether a foreign arrest warrant can be used to satisfy the requirements of *Payton* and *Steagald*. If the Court fails to clarify this issue, law enforcement officers may continue to rely upon such warrants to make arrests in other states, thereby avoiding the intended effect of *Payton* and *Steagald*.

II

The Decision of the Court of Appeals is in Direct Conflict with the Ninth Circuit's Decision in *United States v. Johnson*.

The petitioner was exercising his Fourth Amendment right to privacy while inside Room 150. According to the evidence, "The drapes were tightly closed, and there was a 'Do Not Disturb' sign on the door, which was also closed." (Transcript, p. 21.) On two occasions, Agent King went to the room dressed as a "bus boy," purportedly to learn the identification of the person thought to be Douglas Nisbet. (Transcript, pp. 21-23, 60-61, 63-65, 86-87, 269-70.) After King's second visit, the agents decided that Nisbet was in the room and that they would enter it to arrest him. (Transcript, pp. 22-25, 65-68.)

To make their final entry, the agents again resorted to the same ruse. Agent King, dressed as a bus boy, knocked

on the door and told the occupants that he needed to get the food tray because he was going off duty.[1] (Transcript, pp. 23-24, 67-68, 87-88.) The agents had no warrant and admitted that they did not have permission from the occupants to enter the room.[2] (Transcript, p. 24.)

In *United States v. Johnson*, 626 F.2d 753 (9th Cir. 1980),[3] special agents went to the defendant's home to make a warrantless arrest. To get inside, they knocked on the door and identified themselves by fictitious names. When the defendant opened the door, the agents then properly identified themselves and arrested him. In holding that the defendant's motion to suppress should have been granted, the Court of Appeals for the Ninth Circuit stated the following:

> "This case can be distinguished from both *Santana* and *Botero*. In *Santana*, the suspect was in full view in the doorway as the officers approached. In *Botero* there was no subterfuge in getting the suspect to open the door; furthermore, exigent circumstances existed.

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[1] In answer to a question by the defense attorney, Agent King answered as follows: "Q. What was the purpose of your being a busboy? A. My purpose in being a busboy was as a disguise to allow the door to be opened in order to complete our investigation." (Transcript, p. 368.) Agent King also testified that he made "false" statements to Mr. Nisbet in an effort to get him to open the door. (Transcript, p. 88.)

In the affidavit for a search warrant, filed after the arrest, Agent McGivney also stated that "...your affiant and other officers *knocked on the door of Room 150 utilizing a ruse*, and after NISBET opened the door the affiant and other officers identified themselves as police officers." (Appendix, p. A-37, paragraph 12.) (emphasis added)

[2] In fact, the government conceded this point, stating in the brief filed with the trial court that, "The Government concedes that McGivney did not have the consent of Jones and Nisbet to enter the room." *Brief In Support of Government's Response to Defendant Larry Jones' Motion to Suppress*, p. 2.

[3] Certiorari was granted to determine whether *Payton* should govern searches and seizures made before the case was decided. In *United States v. Johnson*, ___ U.S. ___, 102 S.Ct. 2579 (1982), the Court affirmed the decision and held that the *Payton* requirements would apply retroactively to all convictions that were not yet final when the decision was rendered.

In contrast, Johnson opened the door of his dwelling after the agents misrepresented their identities...

* * *

Similarly, it cannot be said that Johnson voluntarily exposed himself to warrantless arrest by opening his door to agents who misrepresented their identities. In light of the strong language by the Court in *Payton* emphasizing the special protection the Constitution affords to individuals within their homes, we find that the warrantless arrest of Johnson, while he stood within his home, after having opened the door in response to false identification by the agents, constituted a violation of his Fourth Amendment rights." 636 F.2d at 757.

The decisions of the Seventh and Ninth Circuits are thus in conflict concerning the use of deception to avoid the necessity of obtaining a warrant before entering a private residence to make an arrest.

The Ninth Circuit's view has also been followed by the Supreme Court of Nebraska in *State v. George*, 210 Neb. 786, 317 N.W.2d 76 (1982). *See also, State v. Schlothauer*, 206 Neb. 670, 294 N.W.2d 382 (1980). *Compare*, 2 LaFave, *Search and Seizure*, §6.1, n. 61.5 (Supp. 1982).

When confronted with the same issue, the Supreme Court of Minnesota avoided reaching a decision but recognized the need for the United States Supreme Court to resolve it. In *State v. Miller*, 316 N.W.2d 23 (Minn. 1982), the court stated the following:

"Whether or not the use of deception and disguise should be ruled out in the *Payton* context and whether or not it is deceptive for a plainclothes policeman to knock on the door of a suspect's house are issues which the United States Supreme Court will also ultimately have to decide. Any decision approving the use of deception and disguise would probably rely on *Osborn v. United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966), *Hoffa v. United States*, 385 U.S. 293, 87

S.Ct. 408, 17 L.Ed.2d 374 (1966), and *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966)—the so-called *Hoffa* trilogy—which approved the use of deception in police investigation under certain circumstances. This trio of cases was relied upon by this court in *State v. Buchwald*, 293 Minn. 74, 196 N.W.2d 445 (1972), which upheld the use of a ruse by police to get a man whom they suspected of having contributed to the delinquency of minor girls to open the door to his hotel room. On the other hand, there are strong arguments which can be made against the use of deception by police. *See for example*, Weinreb, *Generalities of the Fourth Amendment*, 42 U.Chi.L.Rev. 47, 66-67 (1974)." 316 N.W.2d at 30.

In view of the conflict in these decisions and the importance of the issue, especially to law enforcement agencies, this Court should grant certiorari to resolve the uncertainty about whether officers may use deception to avoid the warrant requirements of *Payton* and *Steagald*.[4]

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[4] The Seventh Circuit commented on the ruse only in a footnote to its opinion. According to this footnote, "Agent King knocked on the door of room 150 and announced that he was a bus boy. When Nisbet opened the door, King displayed his badge and announced that Nisbet was under arrest. The agents did not enter the room until Nisbet began struggling with them." 696 F.2d at 487, n.7; Appendix, p. A-12. This may suggest that the arrest was valid since the officers did not enter the room before making it. If so, this conclusion is also in direct conflict with *Johnson*, where the Ninth Circuit stated the following:

"In this case, we are confronted with the situation where the suspect was arrested as he stood inside his home and the officers stood outside his home with drawn weapons. In these circumstances, it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home." 626 F.2d at 757.

See, also, State v. George, 210 Neb. 786, 317 N.W.2d 76, 80 (1982), for an identical holding.

III

The Decision of the Court of Appeals is in Conflict with Recently Adopted Rule 41(c)(2) of the Federal Rules of Criminal Procedure.

The petitioner's Fourth Amendment rights were violated when federal officers entered his motel room without a search warrant even though they had ample time to obtain a telephonic search warrant pursuant to Rule 41(c)(2) of the Federal Rules of Criminal Procedure.

This Rule expressly authorizes a federal magistrate to "issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means." The federal agents here purportedly entered to execute an Illinois fugitive warrant and made no effort whatever to obtain either a federal or an Indiana warrant to enter the room or make the arrests. (Transcript, pp. 24-25, 86, 88-89.)

According to the evidence, the agents arrived at the Holiday Inn at noon on July 27th, and entered the room at 5:30 p.m. to make the arrests. During this entire period, they made no effort to obtain court approval for their anticipated entry. At the petitioner's request, the district judge judicially noted that Crawfordsville is only 47 miles from Indianapolis. (Transcript, p. 128.) The agents therefore had ample time within which to travel to Indianapolis to obtain a search warrant.

During the hearing on the motion to suppress, the agents insisted that they did not have probable cause to arrest Nisbet until 3:30. Agent McGivney testified that the agents were unable to identify Nisbet positively until Agent King made the second visit to the motel room. (Transcript, pp. 62-65.) Even assuming that this is correct, the agents still had almost two hours in which to obtain judicial approval of their decision to enter the motel room. Instead, Agent McGivney testified that he spent the next two hours calling

in various agents and officers in "staggered time" periods to arrange for the entry into the room. (Transcript, p. 65.)

At the very least, the agents should have contacted the federal magistrate in Indianapolis by telephone to obtain judicial approval of their actions. There is no question but what this could have been accomplished between 3:30 and 5:30. A telephone was available to the agents and a federal magistrate was available in Indianapolis on July 27th. In fact, Agent McGivney testified that he went to Indianapolis and, four hours after the arrest, obtained a search warrant from a magistrate. (Transcript, pp. 8-9.)

In 1978, shortly after the telephonic procedures were added to the Federal Rules of Criminal Procedure, the United States Court of Appeals for the District of Columbia Circuit commented on the procedures as follows:

> "[W]e contemplate with satisfaction an end to the long procession of cases in which the prosecutor has been before us pleading exigent circumstances as the justification for failure to seek a warrant." *United States v. Strother*, 578 F.2d 397, 401 (D.C. Cir. 1978).

In 1981, the same court concluded that the procedures were mandatory and that the government "must ordinarily introduce evidence on the availability of a telephone warrant and on the time required to obtain one" if it wanted to justify a warrantless search. *United States v. McEachin*, 670 F.2d 1139, 1146-48 (D.C. Cir. 1981). Although the court did find exigent circumstances in that case, it noted the following:

> "The legislative history of the 1977 Amendment to Rule 41(c), allowing for telephonic warrants, indicates that Congress intended to encourage police to use the telephonic warrant procedure, particularly where the existence of exigent circumstances is a close question and the police might otherwise conduct a warrantless search." 670 F.2d at 1146.

See, also, 8A Moore's *Federal Practice*, 2nd ed. (June 1981 rev.) §41, pp. 41-12, 41-16, 41-19, 41-92 to 93, 41-97 to 102,

which contains the Advisory Committee's notes and the legislative history of the proposed changes.

In *United States v. Baker*, 520 F.Supp. 1080 (S.D. Iowa 1981), the court granted the defendant's motion to suppress on facts similar to those here. Federal and state officers entered the defendant's home without a warrant and arrested him. The court found that the agents had at least one hour and fifteen minutes in which to obtain a warrant by telephone and concluded that this was "abundant time" in which to do so. 520 F.Supp. at 1083. In granting the motion to suppress, the court stated:

> "The Supreme Court and Congress adopted the telephonic search warrant procedure to accommodate the very situation presented by this case. It is to be used." 520 F.Supp. at 1084.

The petitioner submits that the telephonic warrant procedures are mandatory and that the government failed to explain why they were not followed here. In *McEachin*, the Court of Appeals for the District of Columbia Circuit stated that it was "troubled" by the "apparent ignorance" of the officers about the telephonic procedures and the failure of the government to introduce any evidence about the availability of the telephonic warrant. 670 F.2d at 1146. The Seventh Circuit expressed a similar concern in this case. During oral argument, the government stated that these procedures were not followed in the Southern District of Indiana because of a policy of the United States Attorney's office. In view of this statement, the court noted:

> "...we are disturbed by the government's policy of not obtaining a telephonic search warrant..." *United States v. Jones*, 696 F.2d at 487; Appendix, p. A-13.

The Seventh Circuit accepted the petitioner's initial contention that an officer must obtain a telephonic search warrant "in an appropriate case." The court erroneously concluded, however, that this was not such a case because the officers were executing an Illinois fugitive warrant.

But for this Illinois warrant, the decision acknowledges that the officers should have obtained a telephonic search warrant. As stated in the opinion,

> "The agents had ample time between first sighting Defendant Nisbet and the arrest to telephone a federal magistrate in Indianapolis for a search warrant. Moreover, probable cause to search the motel room existed at least as early as 3:30 p.m. when the agents completed a positive identification of Nisbet. * * * Had the agents secured a telephonic search warrant before arresting Nisbet and Jones, the issues surrounding a warrantless search would have been defeated before they ever arose. That is precisely the desired effect of the rule. * * *" 696 F.2d at 587; Appendix, pp. A-13 to A-14.

Rule 41(c)(2) of the Federal Rules of Criminal Procedure was adopted in 1977 and courts are now being asked to decide how it should be applied. The few reported cases indicate that the courts intend the procedures to be used but that the government has consistently avoided doing so, either by ignorance, carelessness, or, as in the present case, by policy.

Certiorari should be granted to clarify this Court's position concerning the mandatory nature of these procedures and to clarify the law for government attorneys and law enforcement officials.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to review the erroneous decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Appendix

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 21, 1983

Before

HON. WILLIAM J. BAUER, *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. PAUL C. WEICK, *Senior Judge**

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	) Appeal from the United States District Court for the Southern
No. 81-2941 vs.	) District of Indiana, Indianapolis Division.
LARRY D. JONES, *Defendant-Appellant.*	) No. IP 81-76-CR S. Hugh Dillin, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Defendant-Appellant Larry D. Jones, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable Paul C. Weick, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

Opinion by Judge Bauer

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 14, 1982

Before

HON. WILLIAM J. BAUER, *Circuit Judge*
HON. RICHARD D. CUDAHY, *Circuit Judge*
HON. PAUL C. WEICK, *Senior Judge**

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 81-CR-76 S. Hugh Dillin, Judge.
Nos. 81-2941 and 81-2952 vs.	)	
LARRY D. JONES, AND DOUGLAS NISBET, *Defendant-Appellant.*	)	

These causes were heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgments of the said District Court in these causes appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

* The Honorable Paul C. Weick, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

IN THE

United States Court of Appeals

For the Seventh Circuit

No. 81-2941
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LARRY JONES and DOUGLAS NISBET,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 81-76-CR - S. Hugh Dillin, *Judge*

ARGUED SEPTEMBER 13, 1982—DECIDED DECEMBER 14, 1982

Before BAUER, CUDAHY, Circuit Judges, and WEICK, Senior Circuit Judge.*

BAUER, Circuit Judge. Defendants Larry Jones and Douglas Nisbet[1] were convicted of conspiracy to possess

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* *The Honorable Paul C. Weick, Senior Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.*

[1] Appellant Douglas Nisbet's brief before this court had his name spelled "Nesbit." His reply brief, however, had his name spelled "Nisbet." Moreover, the government's answer brief used "Nesbit," although the fugitive and search warrants at issue in this case spell [sic] the name "Nisbet." We deem Douglas's own signature of "Nisbet" on a motion before the district court, and his testimony on direct examination, to be the best evidence of the correct spelling of his name, and therefore adopt it in this opinion.

cocaine with intent to distribute, and of possession of cocaine with intent to distribute. Nisbet also was convicted for assaulting federal officers engaged in performance of their duties.

The defendants have alleged as many as two dozen separate errors in the proceedings, including the illegality of their arrests and the room search, the sufficiency of evidence on several issues at trial, evidentiary errors, possible juror prejudice, and faulty jury instructions. Many of these allegations are without merit, and therefore we treat them summarily. The remaining alleged errors are discussed below. We affirm.

I. FACTS

On July 24, 1981, Special Agent James McGivney of the Federal Drug Enforcement Administration learned from Special Agent Frank Waldrup of Illinois about two outstanding Illinois warrants charging Defendant Douglas Nisbet with unlawful delivery of a controlled substance and failure to appear. In addition, Waldrup said that his informant advised that Nisbet would be in Crawfordsville, Indiana, carrying a large quantity of cocaine. The next day, Agent McGivney received from Agent Waldrup a two-year-old photograph of Nisbet and copies of the unexecuted warrants, which McGivney confirmed through the National Crime Index Computer System. On July 27, Agents McGivney and Waldrup along with an investigative team of ten law enforcement agents and officers from Illinois and Indiana gathered in Bloomington, Indiana to formulate plans to apprehend Nisbet. Two federal agents, King and Casey, immediately traveled to the Holiday Inn at Crawfordsville, where Waldrup's informant said Nisbet would be staying.

The agents arrived at the motel at about noon and saw a man near the swimming pool fitting Nisbet's description. The other agents arrived soon thereafter and watched Nisbet through a motel office window located at least

twenty-five feet from the swimming pool. During this time, Agent McGivney discovered through motel registration records that room 150 was registered to "L. Jones" from Sunrise, Florida, for two persons. At about 1:15 p.m., Nisbet left the pool area and eventually went to room 150. Knowing that Nisbet had registered in other hotels under the same name, McGivney immediately placed room 150 under surveillance. At that time, Nisbet and his companion already had been registered in the Holiday Inn for three days.

At 1:30 p.m., Agent McGivney, in cooperation with the motel manager, sent Agent King to room 150 dressed as a bus boy to deliver a large quantity of food which someone in the room had ordered. After the delivery King reported that he saw two men, one matching Nisbet's description, and drug paraphernalia in the room.

The agents continued their surveillance until approximately 3:30 p.m., when Agent King returned to Nisbet's room, ostensibly as a bus boy to retrieve the food trays. This time, although Nisbet met King at the door, King was neither admitted to the room nor given the trays. Again King positively identified Nisbet, and the agents decided to make an arrest based on the Illinois warrants and their informant's representations.

The agents delayed executing the arrests until 5:30 p.m., when they followed Agent King back to Nisbet's room. King announced that he had come to pick up the food trays because he was going off duty. Nisbet opened the door with the food tray in his hands. King announced, "Police!" A struggle ensued; a shotgun was discharged, and Nisbet and Co-defendant Jones were arrested. The two men were hustled from their room, handcuffed, and placed face down on the grass outside the motel. At the same time, Agent McGivney conducted a "protective sweep" of the room, discovering in plain view two plastic bags containing "green vegetable" material, white powder scattered on top

of a television, and an open suitcase containing a paper bag filled with packets of a white powder. The suitcase also contained drug paraphernalia.

After the sweep, room 150 was secured while Agent McGivney obtained a search warrant from a United States Magistrate in Indianapolis. A thorough search then netted several packages containing cocaine, scales, and "cutting" agents and equipment.

II. DELAY BEFORE ARRESTS

The defendants contend that because the law enforcement agents first observed Nisbet at about noon on July 27, 1981, but waited until 5:30 p.m. to make the arrests in Nisbet's motel room, the sweep of that room was improper. They argue that the one hour or longer surveillance of Nisbet at poolside was time enough to establish Nisbet's identity and make an arrest. Further, they suggest that the four-hour delay after Nisbet had secluded himself in his motel room did not assist in identification and was merely a pretext to gain entrance to the room where the agents hoped to find incriminating evidence. Despite its crystal clarity, however, we decline to exercise hindsight to fault the investigators' decision to delay arresting Nisbet simply because the subsequent maneuvering did not significantly aid in identifying the suspect.[2] Only the first hour or so delay before Nisbet left the swimming pool area and went to his room is questionable. After that the defendants cannot complain, because they were in room 150 the entire ensuing four hours.

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[2] For that matter, we believe that Agent King's two visits to room 150 were helpful. A face-to-face confrontation with a suspect is more reliable than surreptitious peering through a window 25 feet away. The four-hour delay after Nisbet went to his room and before he was arrested suggests careful police investigation rather than underhanded delay. In fact, the delay could have worked to the agents' disadvantage. During that time Nisbet and Jones might have disposed of the drugs by flushing them away or ingesting them, and camouflaged the paraphernalia.

In *United States v. James*, 378 F.2d 88 (6th Cir. 1967), heavily relied upon by the defendants, the Sixth Circuit reversed a conviction and remanded with instructions to suppress evidence obtained in an apartment search. There the issue of purposeful police delay arose because the agents had obtained an arrest warrant one or two days before the arrest, but had never secured a search warrant although they fully intended to search the apartment. During that search, they found narcotics in a vacuum cleaner in a bedroom closet. That case differs substantially from our defendants' complaint that Agent McGivney should have completed a positive identification check on Nisbet and arrested him at poolside within the short time before he went to his room. The other cases cited by the defendants, *Harris v. United States*, 321 F.2d 739 (6th Cir. 1963); *United States v. Weaver*, 384 F.2d 879 (4th Cir. 1967), *cert. denied*, 390 U.S. 983 (1968); and *Williams v. United States*, 418 F.2d 159 (9th Cir. 1969), *aff'd*, 401 U.S. 646 (1971), among others, also do not persuade us that the delay here was wrongful.[3]

A delay of sixty to ninety minutes to insure against falsely identifying a person, who was seen through a window twenty-five feet away and compared to a two-year-old photograph, cannot constitute the type of delay which violates constitutional rights.[4]

III. VALIDITY OF ARRESTS

After he had conferred with Illinois Agent Waldrup, Federal Agent McGivney confirmed through the National

[3] In fact, *Williams* approved a 1 3/4-hours search of the defendant's residence after police waited six hours for him to return.

[4] Notably, all of the cases cited by the defendants involved carefully conducted exploratory searches for evidence. Agent McGivney, on the other hand, made only a 90-second or less "protective sweep" of the motel room to be certain that it was secure against any risks to the law enforcement agents.

Crime Index Computer System that Defendant Nisbet was wanted by Illinois law enforcement officials for unlawful delivery of a controlled substance and failure to appear. The government relied upon these warrants and the knowledge that Nisbet was transporting cocaine as probable cause for Nisbet's arrest. Both defendants claim that their arrests were improper.

Nisbet argues that McGivney's affidavit submitted to obtain a search warrant after the arrests did not demonstrate that the officers had probable cause for the earlier arrest because the affidavit was conclusory and based upon information from an informant who, Nisbet alleges, was not proved reliable. We disagree. First as a general proposition, a search warrant cannot always be utilized as a measure of probable cause for an arrest. Although much of the factual information might overlap, probable cause to search differs from probable cause to arrest. Therefore, an affidavit may support the issuance of a search warrant without stating adequate grounds for an arrest. Moreover, this court will not invalidate an arrest merely because a subsequent affidavit does not demonstrate probable cause. The crucial determination is whether the agents actually had probable cause at the time of arrest. *United States v. Fernandez-Guzman*, 577 F.2d 1093, 1098 (7th Cir.), *cert. denied*, 439 U.S. 954 (1978). We find that the agents here had probable cause to arrest Nisbet, based on their confirmed knowledge that he was being sought for two crimes and their information from that informant. Second, we are convinced that the affidavit for a search warrant did illustrate probable cause for Nisbet's arrest.[5] The information contained in the affidavit

[5] The affidavit read, in part:

Your affiant is a Special Agent of the Federal Drug Enforcement Administration and has been so employed for approximately 10 years.

1. That the information contained in the following numbered paragraphs below is personally known to your affiant or has been

(Footnote continued on following page)

was factual, not conclusory. Agent McGivney relied on Agent Waldrup's representations as to the informant's reliability and veracity. We cannot fault that reliance.[6]

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[5] (Continued)

personally told to your affiant by the individuals named in the numbered paragraphs below.

2. That on Thursday, July 24, 1981, your affiant was personally advised by a police officer known to him that the police officer had told him that an informant told the police officer of the activities of an individual identified by the information as Douglas NISBET, a fugitive from justice.

3. That your affiant was personally told by the police officer that the informant had provided information to him and other police officers on at least three occasions in the past and that this information concerning criminal activities of persons had been independently corroborated by the police officer and other police officers.

4. That you affiant was personally told by the police officer that the informant personally told the police officer that Douglas NISBET was wanted on criminal charges in the State of Illinois and that NISBET was a fugitive from the State of Illinois and using an assumed name.

5. That your affiant was pesonally told by the police officer that the police officer had personal knowledge of NISBET's fugitive status and pending charges in the State of Illinois.

6. That your affiant personally verified that NISBET was wanted on criminal charges in the State of Illinois through a check with the National Crime Informaton Center (NCIC) which revealed one Douglas NISBET to be listed on the following charges and warrants: (A) Unlawful delivery of a Controlled Substance and Failure to Appear, Warrant #78CF867, Champagne [sic] County, Illinois, dated 5/22/79 from Douglas County, Illinois. That your affiant personally observed copies of the aforementioned warrants and copies of the warrants are marked Exhibits A and B, and that by reference incorporated herein, as attached.

7. That your affiant was personally told by the police officer that a confidential informant advised him that NISBET would be in the area of Crawfordsville, Indiana, during the period 7/26/81 through 7/28/81.

[6] Following the lead of the Supreme Court in *United States v. Ventresca*, 380 U.S. 102 (1965), many lower courts have held consistently that another law enforcement officer is a reliable source of information to establish probable cause. *See generally* 1 W. LaFave, Search and Seizure 3.5, at 619-21 (1978). Reliability seems especially clear in this case where Agent Waldrup, the officer upon whom McGivney relied, stated sufficient grounds to establish the reliability of his informant.

Thus, the agents' reliance upon the knowledge that Nisbet would be in Crawfordsville with cocaine was proper. *See, e.g., United States v. Scott*, 545 F.2d 38, 40 (8th Cir. 1976), *cert. denied*, 429 U.S. 1066 (1977). In addition, the existence of outstanding warrants, confirmed through computer records, is authority for an arrest.

Defendant Jones contends that his arrest likewise was executed without probable cause. He argues that the agents arrested him before they had any grounds to do so, and that the subsequent sweep of the room which revealed drug paraphernalia could not be used to justify his arrest, regardless of the validity of that sweep.

In *Michigan v. Summers*, 452 U.S. 692 (1981), the Supreme Court discussed its long-held view that certain seizures, despite implicating Fourth Amendment protection, constitute such limited intrusions on the rights of the persons detained and are justified by such substantial state interests that they may be made on a standard less than probable cause. *Id.* at 699. As noted in *Terry v. Ohio*, 392 U.S. 1, 19 (1968), "the central inquiry under the Fourth Amendment" is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."

Here, the agents had probable cause for Nisbet's arrest. When they entered room 150, they immediately confronted a second person— Jones— who they already knew was in the room. The agents also knew, from Agent King's earlier entry into the room, that the room was littered with drug paraphernalia and substances resembling drugs. In addition, room 150 was registered to "L. Jones." It would have been absurd for Agent McGivney to have taken Nisbet out of the room while ignoring Jones. Instead, Jones was detained. If the information supplied by Agent King at 3:30 p.m. was not enough in itself to constitute probable cause to arrest Jones, the information gleaned by McGivney in his rapid sweep of the motel rooms certainly erased any doubt

about the officers' right to make the arrest. Probable cause requires facts and circumstances sufficient to convince a prudent person that the suspect had committed or was committing a crime. *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975). That standard was satisfied.

IV. VALIDITY OF SEARCH

The defendants next argue that the law enforcement agents were required to obtain a search warrant before entering the motel room to make the arrests. Because there was no search warrant, the defendants contend that all of the evidence seized during both the "protective sweep" and the full-blown search should be suppressed. The Supreme Court, however, twice has expressly declined to require such a procedure under the Fourth Amendment. *Steagald v. United States*, 451 U.S. 204, 221 (1981); *Payton v. New York*, 445 U.S. 573, 602-03 (1980). The *Payton* Court considered whether police could enter a suspect's dwelling to effect an arrest without either an arrest warrant or a search warrant. The Court concluded that warrantless, nonconsensual entry to make a routine felony arrest violates the Fourth Amendment. The Court refused to require a *search* warrant, however, holding that an arrest warrant sufficed.

An intrusion into a personal residence to make an arrest implicates two constitutional interests: the right to be free from an unreasonable seizure, and the right to be free from an unreasonable search of the residence. *See Steagald v. United States*, 451 U.S. at 215-16. When the suspect is in his own home, a determination of probable cause to arrest that suspect made by a detached magistrate is a sufficient shield from unreasonable searches. The *Payton* Court emphasized this, stating:

> It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the

> magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicity carried with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Payton v. New York, 445 U.S. at 602-03. The defendants here shared the motel room registered to Defendant Jones. Although the constitutional protections against unreasonable searches and seizures extend generally to guests in motel rooms, *Stoner v. California*, 376 U.S. 483, 490 (1964), those protections were not threatened because the agents relied upon existing arrest warrants when they approached room 150.[7]

The defendants also argue that the law enforcement agents should have obtained a telephonic search warrant pursuant to Federal Rules of Criminal Procedure 41(c)(2).[8] We cannot agree that a search warrant was constitutionally compelled in this case. We doubt that Agent McGivney's actions upon arresting the defendants constituted a search

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[7] The sequence of events surrounding the arrest also indicates that Defendants Jones's and Nisbet's right to be free from unreasonable searches was not violated. Agent King knocked on the door of room 150 and announced that he was a bus boy. When Nisbet opened the door, King displayed his badge and announced that Niset was under arrest. The agents did not enter the room until Nisbet began struggling with them. During the struggle, Nisbet fell back into the room where he was subdued. Then, Jones was discovered and arrested, and Agent McGivney conducted a brief "protective sweep" of the premises.

[8] "(A) General Rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means." Fed.R.Crim.P. 41(c)(2)(A) (1979).

at all.[9] In any case, the protective sweep conducted here certainly was within the boundaries of constitutionally valid searches established in *Chimel v. California*, 395 U.S. 752, 762-63 (1969), and its progeny. The police may search adjoining rooms to look for possibly dangerous persons. *Warden v. Hayden*, 387 U.S. 294, 299 (1967); *United States v. Agapito*, 620 F.2d 324, 335-36 (2d Cir. 1980); *United States v. Miller*, 449 F.2d 974, 977-78 (D.C. Cir. 1971). *See Chimel*, 395 U.S. at 763 n.8 (affirming *Katz v. United States States*, 389 U.S. 347, 357 (1967), which cited *Warden v. Hayden* as one of the exceptions to the search warrant requirements.)

In *Miller*, the District of Columbia Circuit affirmed a conviction obtained in part on evidence discovered during a warrantless search of a five-room dentist's office, because the search was necessary to assure the officers' safety. The same reasoning applies here. The agents did not know who, other than Defendant Nisbet and one other person, was in room 150. Moreover, they had good reason to believe that anyone else who may have been in the room would be hostile to them.

Although we find that a search warrant was not necessary, we are disturbed by the government's "policy" of not obtaining a telephonic search warrant as authorized by Federal Rule of Criminal Procedure 41. *See supra* note 8. The agents had ample time between first sighting Defendant Nisbet and the arrest to telephone a federal magistrate in Indianapolis for a search warrant. Moreover, probable cause to search the motel room existed at least as

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[9] McGivney looked around the single room and the adjoining bathroom during a "search" which in all probability lasted less than 90 seconds. Apparently nothing was discovered except what was in plain view from the moment the agents entered the room, see *Ker v. California*, 374 U.S. 23, 42-43 (1963), *United States v. Griffin*, 530 F.2d 739, 744 (7th Cir. 1976), and no evidence was seized until after the room was sealed and a proper warrant obtained.

early as 3:30 p.m., when the agents completed a positive identification of Nisbet. We note also that Agent King reported seeing drug paraphernalia after he entered room 150 at 1:30 p.m. Had the agents secured a telephonic search warrant before arresting Nisbet and Jones, the issues surrounding a warrantless search would have been defeated before they ever arose. That is precisely the desired effect of the rule. Law enforcement agents should be encouraged to seek search warrants by whatever means, whenever possible.

In response to inquiries from this panel, the government's lawyer explained that the office of the United Stated Attorney in Indiana had a general policy to avoid using telephonic search warrants. This policy contravenes the express purpose of the telephonic search warrant rule.

> Even when a search warrant would not be required to enter a place to search for a person, a procedure for obtaining a warrant should be available so that law enforcement officers will be encouraged to resort to the preferred alternative of acquiring "an objective predetermination of probable cause," *Katz v. United States*, 389 U.S. at 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), in this instance, that the person sought is at the place to be searched.

Fed. R. Crim. P. 41(c)(2) advisory committee note (1979). *See also* S. Rep. No. 354, 95th Cong., 1st Sess. 10, *reprinted in* 1977 U.S. Code Cong. & Ad. News 527, 534; *United States v. McEachin*, 670 F.2d 1139 (D.C. Cir. 1981).

V. MIRANDA WARNINGS

After Nisbet and Jones were arrested, they were forced to lie down on the lawn outside of the motel room, where they were advised of their rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The defendants now complain that their subsequent statements were inadmissible because their arrests and the protective

sweep were illegal, and because the government failed to show that the defendants understood the warnings. The defendants argue that, because the *Miranda* warnings were given shortly after the shotgun blast during the arrest, they were in a state of shock and could not appreciate the *Miranda* warnings.

Initially, we reject the suppression argument that any statements were tainted by illegal activities of the agents, because we hold that the arrests and the searches in this case were not improper.[10] The second contention also is unpersuasive. Agent Casey read the *Miranda* warnings to Nisbet and Jones from a prepared form. Each statement of a right or warning is in the question form "Do you understand...?" After each question, Casey paused for an answer, which he apparently received. Finally, although a point-blank shotgun blast is very violent, we do not believe that the explosion necessarily meant that the defendants could not appreciate the import of the warnings given to them. The evidence from the agents, the defendants, and the examining physicians does not demonstrate that Nisbet and Jones were so injured that they could not understand

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[10] Two agents who rode in the ambulance with the defendants when they were taken to and from a hospital in Crawfordsville for examination of any possible injuries exchanged a few words with the defendants during the ambulance rides and at the hospital. All that Jones said was that that day was his daughter's birthday. Nisbet, however, made several remarks implicating him in the criminal activity in response to comments made by one of the agents.

At approximately 9:00 p.m., after the arrests and the hospital visits, the defendants were taken to Indianapolis for processing. Defendant Jones was given a document which reiterated his rights and contained a waiver of rights form which Jones signed. He now argues that the written rights and waiver form is insufficient to constitutie an effective waiver of his rights. We reject that argument. The agent asked Jones whether he could read and write and whether he understood what he was reading.

The warnings given outside of the Holiday Inn were sufficient to inform the defendants of their rights to counsel and the possible consequences of speaking without the benefit of a lawyer. The additional rights and waiver form further assured protection of those rights.

what they were told. Therefore, we find that the first set of *Miranda* warnings given outside the motel were adequate to safeguard the defendants' rights.

VI. TRIAL

The defendants have raised several issues involving the sufficiency of evidence presented by the government and several allegations of improper prosecutorial conduct.

First, Defendant Nisbet urges reversal because the government failed to rebut his claim that he was coerced into transporting the narcotics from Florida to Indiana. We need not recite the complicated scenario that Nisbet used in his defense. The government presented an abundance of evidence challenging Nisbet's story that he was attempting to save his fiancee's life by smuggling cocaine into Indiana. Nisbet's cross-examination alone raises serious doubt about his defense.[11] This court will not disturb a jury's verdict if it is supported by substantial evidence viewed most favorably to the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Santiago*, 582 F.2d 1128, 1130 (7th Cir. 1978). The defendants have failed to show where the government did not support its burdens of proof.

Second, Nisbet argues that the government did not sustain its burden of proof that Nisbet assaulted the federal agents at the motel room doorway. He argues that the trial court itself expressed hesitancy with the assault verdict at

[11] Simply stated, Nisbet claimed that a man held his fiancee captive at gunpoint, ordering Nisbet to either deliver the "white powder" to Indiana in payment of a large gambling debt or be killed. On cross-examination, however, Nisbet admitted that, although he allegedly feared greatly for his fiancee's life, he did not mention the situation to authorities after his arrest. Our review of the trial transcript uncovered other testimony from several witnesses which further, and more deeply, undercut Nisbet's defense. This is not a trial court; the government surpassed its burden of presenting evidence to withstand our standard of review. *United States v. Castenada*, 555 F.2d 605 (7th Cir.), *cert. denied*, 434 U.S. 847 (1977).

sentencing when the judge commented, "Count 3, the assault—everything happened pretty rapidly at that door. I'm not too excited about that."

Nonetheless, the court sentenced Nisbet to one year of imprisonment on the assault conviction. More importantly, of course, the court denied all of the defendants' motions for relief on any of the jury verdicts. The trial judge's comments at the sentencing hearing bear little weight in the consideration of the sufficiency of the evidence at trial.

Three government witnesses testifed repeatedly that Nisbet threw the food tray at Agent King when King announced that he was a police officer.[12] There is no doubt

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[12] Several government witnesses testified to the events which occurred when Nisbet opened the door to room 150 at 5:30 p.m. Agent King, the agent who dressed as a bus boy when Nisbet was arrested, testified:

Q Did you return, then, at 5:30 p.m. that afternoon?

A Yes, ma'am.

Q What happened at that time?

A At 5:30 I went back to the room accompanied by other agents and officers. I knocked upon the door. The door was opened again slightly by Mr. Nisbet. I asked Mr. Nisbet once again for the food service refuse and garbage. Mr. Nisbet once again said that he was not finished with it. I explained to him that I was getting off the shift in just a few minutes and that I would like to retrieve the garbage, especially the large tray. Mr. Nisbet agreed. He shut the door at that point.

Approximately one minute later he came back to the door carrying a big tray with several items on top of it. As he opened the door my first words were, "Police. You're under arrest." The tray came over the top of myself. Agent McGivney was to my immediate left in the doorway at this point. The tray struck me on the left arm, knocked me against the right door jamb. A shotgun Mr. McGivney was carrying discharged. There was a large amount of shrimp cocktail splattered on my clothing and across my face. I then, after being knocked to the side of the door, sort of regained my composure and entered the room at that point.

Tr. at 370-71. Agent Casey testified on direct examination:

Q When you came around the building behind McGivney, what did you see or what happened?

Q Special Agent McGivney went to the left of the door, to the left of Special Agent King, and I went right behind Special Agent King.

(Footnote continued on following page)

that the government's evidence qualifies as "substantial" on the assault charge.

(Continued)

As this all happened in a very few seconds, I observed Defendant Nisbet. He had a tray in his hand, and he threw the tray forward, and I saw a red substance flying through the air and I heard some dishes clattering....

Tr. at 399-400. On direct examination, Agent McGivney, the agent in charge, testified:

Q At about 5:30 when you effected the arrest, would you tell the jury what occurred.

A Yes, ma'am. At 5:30— Special Agent King and I had previously agreed that we would knock on the door of room 150 in an attempt to have the occupants, Mr. Nisbet and Mr. Jones, open the door. At that time, Mr. King knocked on the door, and I was in the position behind an overhanging brick wall on the left side of Mr. King where I couldn't be seen by the people in the doorway. At that time, Mr. King knocked on the door and I heard the door open. I heard Mr. King ask if he could have the room service tray as he was going off shift and needed to turn it back to the kitchen. I heard the door close. Short time later I heard the door open, and at the same time I swung around the corner of the wall and faced the door. Simultaneously Special Agent King identified himself as a police officer and told Mr. Nisbet he was under arrest. Mr. Nisbet was standing inside the doorway, had a large tray with some dishes and dinnerware on it. At that time he flipped the tray, the contents of the tray, toward Special Agent King and myself and swung the tray towards me. Special Agent King and I were both hit with some of the dishes. I observed Special Agent King go backwards and sort of lose his balance or go down against the door jamb. At the same time I stepped in with the shotgun and parried the blow of the tray. When I did that, the shotgun went off.

Tr. at 281-82. On cross-examination, McGivney testified:

Q Isn't it a fact, Agent McGivney, that when you came in the room you had your shotgun in a carrier position and bought it upward; isn't that a fact? You raised the shotgun, the barrel upwards?

A As I came in, as I remember it, sir, I had the shotgun in a port arms position and pushed it out in that manner.

Q And when you pushed it out in that manner, it came in contact with the tray, did it not?

A The tray was being swung towards me at that time.

Q But the shotgun came in contact with the tray?

A Yes, it did.

Q The hole in the tray was a result of the shotgun going off?

A Yes, sir.

(Footnote continued on following page)

We note that reversal on the grounds of insufficient evidence is proper only when the prosecution's failure to

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(Continued)

Q But you actually moved the shotgun into the tray?

A The tray was being swung toward me, and I parried the tray with the shotgun.

Tr. at 320-21. And finally, Agent McGivney testified on redirect examination:

Q And yesterday you also testified with regard to how the tray and—how your shotgun discharged. Would you reiterate how that occurred.

A Yes, ma'am. As I stepped around to the open door of 150 after Agent King had identified himself as a police officer—at the same time as Agent King had identified himself as a police officer, stepped into the doorway, Mr. Nisbet tossed the contents of the tray towards us. There was different eating utensils on it, dishes. There was a bowl of shrimp cocktail sauce. And at the same time swung the tray towards me, and I took the shotgun, which I had at what we would call port arms, and put it in a bayonet-type position to block the tray.

Tr. at 355-56.

Defendant Nisbet countered the government's case on direct examination, testifying:

Q Now, at the time will you tell me as to the best of your recollection exactly what happened from the time the agents came to the room until you were taken away from the area. Can you go through that and tell the jury and Judge what happened.

A There was a knock on the door. I went to the door, opened it. A man dressed as a bus boy was at the door and asked me for a tray. I told him I was not done with the tray. He said he was going off shift and they were out of trays, he had to have the tray. I said, "Just a minute," closed the door. I went back, cleared the tray of any food. When I went back to the door, I held the tray in my hands, put it against the door frame and against my stomach, reached over, let go of the tray with one hand, opened the door, cracked the door open, grabbed back ahold of the tray on my side, stepped back, stood on one foot to open the door with my foot—and the door was forced open, I was knocked backwards. When I went backwards, the tray went up and over. The next thing I saw was a gun in my face.

Q All right. Now, at any time did you swing the tray towards or at either Agent McGivney or Agent King?

A Absolutely not.

Q Do you know why the tray went up and over? What caused it to do that? When did you see?

A The door hit the tray when it was forced open from the outside after I had cracked the door.

Tr. at 550-51.

sustain its burden is clear. *Burks v. United States*, 437 U.S. 1, 16-17 (1978). Additionally, neither the trial court nor this court should invade the jury's province by assessing the credibility of witnesses on a motion of acquittal or reversal based on insufficient evidence. *United States v. Ford*, 324 F.2d 950, 952 (7th Cir. 1963).

Nisbet's other sufficiency of evidence arguments are less meritorious.[13] Similarly, we find that Defendant Jones's argument that the government did not prove that he possessed and intended to distribute drugs is not persuasive. The facts shown at trial on those issues go far beyond the cases cited by Jones showing that mere presence

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[13] Nisbet also complains about several answers given by government witnesses, alleging that the answers so prejudiced the jury that Nisbet could not have received a fair trial.

The most serious allegation goes as follows: At trial, Agent King was asked how he processed Defendant Nisbet. He responded, in part:

> The last thing that is usually accomplished in the processing is that the Drug Enforcement Administration has a rights form, which is a paragraph that sets out the defendant's constitutional rights under the *Miranda* ruling. I read that to Mr. Nisbet. There is a subparagraph under that form that is headed by the word "Waiver". If the individual wishes to waive his rights and make a statement to the agents or officers at this point, they're asked to sign that. I read that to Mr. Nisbet and asked him to sign and he refused to sign it....

Tr. at 379. Nisbet's lawyer immediately moved for a mistrial. They claim now that the mention of Nisbet's refusal to sign a waiver form "clearly focused" on Nisbet's *prior* criminal activity and his right to remain silent. There is no doubt that King should not have mentioned the waiver form in his testimony. However, the testimony is not so damaging as to require reversal.

In fact, as the trial court recognized, that answer along with another answer from King more likely implicates only the assault charge being tried, not earlier charges which arose in 1979. Moreover, the court carefully instructed the jury to disregard the refusal to sign the waiver because such a refusal is an exercise of a constitutionally protected right.

is insufficient to convict. Once again, the trial judge's comments at sentencing[11] do not sway our position.

VII. JURY

During *voir dire*, the following colloquy took place between the trial judge and a prospective juror:

> JUDGE: And now, getting back to you Mr. Brooks... If you were selected as a juror... could [you] arrive at your verdict based solely on the facts as you find them....?
>
> * * *
>
> JUROR: No.
>
> * * *
>
> JUROR: I am not saying that I exactly believe what the newspaper reporter put in the paper, but what's involved here I am definitely against and I—
>
> JUDGE: Now, Mr. Brooks, whoa. I didn't ask you to make a speech....

---

[11] The trial judge stated when considering Jones's motion for acquittal at the close of all the evidence:

> All right. Well, I certainly have seen stronger cases in my lifetime than the one against the Defendant Jones. On the other hand, the evidence is that he was with Mr. Nisbet for some four days, I believe, and he furnished the car to bring them to Indiana; that at least one drug transaction took place while they were in Indiana, $7,000 worth of drugs sold allegedly to a person from Illinois, I believe; that all of these drugs and drug paraphernalia were there in full view. And, in addition to the straight charge or charges contained in the indictment, that he conspired and that he actually possessed the stuff, the Court cannot overlook Title 18, United States Code, Section 2, the aiding and abetting statute, which provides, of course, that anyone who aids or abets another in the performance of a crime may be convicted and punished as a principal. So, whether Mr. Jones was a principal or not, there is evidence I believe from which the jury could find that at the very least he aided and abetted Mr. Nisbet. And so, for that reason, I feel obliged to overrule the motion.

Tr. at 601-02.

Tr. at 237-238. Minutes later another juror responded to a question regarding his thoughts on a defendant's right to refuse to testify, saying:

> JUROR: I agree. They shouldn't be made to testify against themselves, but I feel, if they have nothing to hide, that—so in that case it may sway me.

Tr. at 251.

Without citing a rule, statute, or case in support of their argument, both defendants claim these incidents violated their right of confrontation and right to an impartial jury because the judge did not dismiss the entire jury panel which heard the remarks.[15] Defendant Nisbet also maintains that he could not have received an impartial jury without having conducted personal oral *voir dire*. We disagree with each contention.

Initially, we note that the federal rules permit the trial court to conduct *voir dire* if it allows the lawyers to supplement the examination. Fed. R. Crim. P. 24(a)(1966). Trial judges increasingly have assumed the duty of at least preliminary examination of potential jurors. We believe this procedure promotes efficiency and, in addition, reduces the possibility of prejudicial error. Here the *voir dire* as reflected in the transcript was artfully conducted. Nisbet and Jones had an opportunity to pose additional questions to panel members. That opportunity adequately protected their rights. *United States v. L'Hoste*, 609 F.2d 796, 801-02 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980).

The decision whether to dismiss any or all jurors lies in the sound discretion of the trial judge. On review, we are charged with determining whether manifest injustice resulted from the judge's refusal to dismiss all of the jurors which heard the improper comments noted above. *Irvin v. Dowd*, 366 U.S. 717, 722-724 (1961). The trial judge in each

---

[15] The judge dismissed the two jurors who made the comments.

instance questioned the potential jurors regarding the sensitive areas surrounding the trial, including the facts that drugs were involved and that one or both of the defendants might choose to not testify at trial. Except for the two dismissed panel members, no juror displayed prejudice. Moreover, neither defendant pressed for dismissal of any panel member other than those that eventually were dismissed. We believe that the defendants were tried by an impartial jury.

One final, unusual occurrence deserves attention because Defendant Nisbet argues that it prejudiced the jury against him. During the second day of trial while Nisbet was being escorted to the courtroom, he allegedly encountered a juror while Nisbet was standing outside of an elevator. Nisbet testified that the elevator doors opened, the juror in the elevator saw him, then the doors closed. At that time, Nisbet was shackled to Brett Kimberlin, a defendant in an unrelated case who had received tremendous local publicity. The encounter could not have lasted more than three or four seconds.

Nisbet claimed prejudicial effect and the judge held a hearing outside of the jury's presence to determine any damage. He found none, and refused to allow Nisbet to question the juror intending instead to rely on a general instruction to disregard such incidents. The trial judge found no evidence of existing or potential prejudice. Moreover, the judge decided that questioning the juror individually would only exacerbate an otherwise harmless event. The general instruction was never given, in part because Nisbet's lawyer himself counselled against it.

The Eighth Circuit in several cases has established that under the circumstances presented here, the defendant bears the burden of showing affirmatively that he was prejudiced by inadvertent exposure to the jurors. *United States v. Carr*, 647 F.2d 867 (8th Cir. 1981); *United States v. Robinson*, 645 F.2d 616 (8th Cir. 1981); *United States v.*

Wright, 564 F.2d 785 (8th Cir. 1977). At least three other circuits, the First, Second, and Fifth, also apply that standard, *United States v. Diecidue*, 603 F.2d 535 (5th Cir. 1979), *cert denied*, *Gispert v. United States* and *Antone v. United States*, 445 U.S. 946 (1980), *Miller v. United States*, 446 U.S. 912 (1980); *United States v. Taylor*, 562 F.2d 1345 (2d Cir.), *cert denied*, *Salley v. United States*, 432 U.S. 909 (1977), *Ramsey v. United States*, *Green v. United States*, and *Wesley v. United States*, 434 U.S. 853 (1977); *Dupont v. Hall*, 555 F.2d 15 (1st Cir. 1977).

We hold that the inadvertent contact here, if any, was not so prejudicial as to require a mistrial. The trial court conducted a hearing in which Nisbet and the marshals escorting him testified in detail about the encounter. The court concluded not only that the juror would not in any way be prejudiced, but also that it was unlikely that the juror even noticed Nisbet standing outside of the elevator in which she was riding. We are satisfied that the hearing protected Nisbet's right to a fair trial.

VIII. POST TRIAL

Several minor issues remain on this appeal. First, both defendants urge reversal because the trial judge refused to give several tendered jury instructions. For example, instead of giving a "specific intent" instruction, the court told the jury that the crimes charged require knowing and willful possession or aiding and abetting. The court then defined "knowing" and "willful" in an instruction:

> The word "knowingly" as used in the Indictment means that an act, if any, was done voluntarily and purposely, and not because of a mistake or accident.
>
> The word "willfully" as used in the Indictment means that the act, if any, was committed by a defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law, not by

> mistake, accident or in good faith. However, a defendant who willfully violated the law need not have known the precise law he was violating.

Tr. at 658-59. The committee on jury instructions in this circuit approved that instruction, and we approve it here. The other instructions on the mental elements of these crimes conformed to standards set in *United States v. Garza-Hernandez*, 623 F.2d 496, 501 (7th Cir. 1980). *See United States v. Bruscino*, 662 F.2d 450, 461 n.23 (7th Cir. 1981).

The jury also was properly instructed in all other aspects challenged by the defendants.

Second, Defendant Nisbet argues that the trial court abused its discretion in sentencing him. Although Defendant Jones was sentenced to concurrent terms of two years on each narcotics conviction, followed by a special parole term of three years, Nisbet was sentenced to concurrent terms of seven years on the narcotics convictions plus one consecutive year on the assault charge and a special parole term of three years.

We recognize that sentencing rests within the sound discretion of the trial judge and, if the sentence falls within the limitations set forth in the statute under which it is imposed, this court rarely will disturb the sentence. *United States v. Madison*, Nos. 80-2118 & 80-2119, slip op. at 20 (7th Cir. Sept. 28, 1982) (*citing United States v. Main*, 498 F.2d (1979)). Nisbet contends, however, that the court improperly considered previous criminal charges (for which he was not convicted) and hearsay information when reviewing Nisbet's background. A judge may consider almost any factor when imposing a sentence, including background information. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 257 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). We have reviewed the transcript of sentencing and find that the trial judge did not rely on any improper information. In *United States v. Harris*, 558 F.2d

366, 371-77 (7th Cir. 1977), this court carefully considered the process for determining an appropriate punishment. There we said that considering hearsay was not *per se* improper, and could be allowed if the information was reasonably reliable or not challenged by the appellant. Here, the trial court did not rely on information that was "materially untrue." *See Townsend v. Burke*, 334 U.S. 736, 741 (1948). In any event, Nisbet did not discredit any of the information the governemnt offered at sentencing.

IX. CONCLUSION

We have considered each error alleged by the defendants; the most important allegations are discussed above, the remaining we can dismiss without comment as not meritorious. Accordingly, the judgments are affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

United States District Court

For The Southern District of Indiana
Indianapolis Division

Docket No. IP 81-76-CR

LARRY D. JONES

Defendant

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on November 24, 1981.

With Counsel William A. Kerr

Plea: Not Guilty

There being a verdict of Guilty.

Defendant has been convicted as charged of the offense(s) of conspiracy to possess cocaine with intent to distribute in violation of Title 21, U.S.C., §846 as charged in Count 1 of the Indictment and possession with the intent to distribute cocaine in violation of Title 21, U.S.C., §841(a)(1) as charged in Court 2 of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years as to Count 1 and two (2) years as to Count 2 followed by three (3) years special parole.

IT IS FURTHER ADJUDGED AND ORDERED that the sentence imposed herein as to Count 1 be served concurrently with the sentence imposed as to Count 2. Total sentence two (2) years followed by three (3) years special parole.

Signed S. Hugh Dillin

United States District Judge

Date 11/24/81

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. IP 81-76-CR
	)	
DOUGLAS NISBET,	)	
LARRY D. JONES,	)	
	)	
Defendants.	)	

MOTION TO SUPPRESS

The defendant Larry D. Jones, by his attorney, hereby moves the Court to suppress the use of the items hereafter described in this motion and to order that the items not be used as evidence against the defendant in any criminal proceeding. In support of this motion, the defendant states the following:

1. On July 27, 1981, Special Agent James J. McGivney of the Drug Enforcement Administration conducted a search of room 150 of the Holiday Inn located at the intersection of State Road 231 and Interstate 74 near Crawfordsville, Indiana. This search was purportedly authorized by a search warrant issued by John Paul Godich, United States Magistrate for the Southern District of Indiana. Based upon the results of this search, Special Agent McGivney then obtained a warrant for the arrest of the defendant, Larry D. Jones.

2. A copy of the arrest warrant, including the complaint and the search warrant affidavit, is attached hereto and incorporated herein as Attachment #1.

3. Paragraphs 14 through 16 of the attached search warrant affidavit clearly disclose that Special Agent McGivney conducted a search of room 150 of the Holiday Inn without a warrant several hours prior to the time that a search warrant was in fact obtained to enter the room involved. This search included the field testing of what Special Agent McGivney thereafter concluded was cocaine.

4. According to paragraphs 12 and 13 of the attached search warrant affidavit, Special Agent McGivney entered the room and conducted the search of the room against the will and without the consent of the occupants of the room.

5. Paragraph 8 of the attached search warrant affidavit discloses that Special Agent McGivney established a surveillance of the Holiday Inn as early as 12:00 noon on July 27, 1981, several hours before the initial search was conducted.

6. The attached search warrant affidavit does not explain why Special Agent McGivney did not obtain a warrant to enter the room during the period that the room was being kept under surveillance despite the fact that there was adequate time for him to obtain a warrant.

7. Paragraphs 10 and 11 of the attached search warrant affidavit disclose that the agents of the United States of America had the opportunity to arrest both of the defendants outside of room 150 but chose to delay the time of the arrests and to make them in room 150 in order to determine what was in the room.

8. Paragraph 17 of the attached search warrant affidavit in fact discloses that Special Agent McGivney believed that he did not have the authority to conduct the initial search of the room and that it was necessary for him thereafter to obtain a search warrant in order for him to seize the items already found in the room.

9. Paragraph 14 of the attached search warrant affidavit lists the various items that Special Agent McGivney observed in the initial search of room 150 of the Holiday Inn. The search warrant affidavit also refers to other items, including books, records, and monies, concealed in the room.

WHEREFORE, the defendant, by his attorney, respectfully requests the Court to suppress the use of the above-described items and to order that the described items, including any and all items seized by agents of the United States of America during the course of this search and any and all statements made by the defendant during or after the search, not be used against the defendant in any criminal proceeding. The defendant also requests an evidentiary hearing and oral argument on this motion.

/s/ William A. Kerr
William A. Kerr
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion to Suppress upon the United States of America by mailing a copy thereof to Kennard P. Foster, Assistant United States Attorney, Room 274, United States Courthouse, 46 East Ohio Street, Indianapolis, Indiana 46204, this 1st day of September, 1981.

/s/ William A. Kerr
William A. Kerr
Attorney for Defendant

United States District Court

FOR THE

SOUTHERN DISTRICT OF INDIANA

Magistrate's Docket No. IP-81

Case No. 146-MO 2

UNITED STATES OF AMERICA	)	
	)	
v	)	WARRANT OF
	)	ARREST
LARRY D. JONES	)	

To any Federal Law Enforcement Officer,

You are hereby commanded to arrest Larry D. Jones, and bring him forthwith before the nearest available United States Magistrate to answer to a complaint charging him with possession with intent to distribute a Schedule II narcotic drug to wit: Cocaine, in the amount of 4.5 pounds in violation of U.S.C. Title 21, Section 841(a)(1).

Date July 28, 1981./s/ John Paul Godich

John Paul Godich

RETURN

United States District Court

FOR THE

SOUTHERN DISTRICT OF INDIANA

Magistrate's Docket No. IP-81

Case No. 146-MO 1

MO 2

UNITED STATES OF AMERICA	)	COMPLAINT for
	)	VIOLATIONS of
v	)	U.S.C. Title 21
	)	
DOUGLAS NISBET	)	
LARRY D. JONES	)	Section 841 (a)(1)

BEFORE John Paul Godich, Indianapolis, Indiana.

The undersigned complainant being duly sworn states:

That on or about July 27, 1981, at Crawfordsville, Indiana in the Southern District of Indiana

Douglas NISBET and Larry D. JONES did unlawfully possess with intent to distribute a Schedule II narcotic drug to wit: Cocaine, in the amount of 4.5 pounds and the complainant states that this complaint is based on

See Attached Affidavit

And the complainant further states that he believes that Thomas J. Casey, Tony H. King, Stephen L. White, Francis H. Eaton, S/A's of the Drug Enforcement Administration, and Rocky McClain, Lance Seever, Rick Barnes, Rick Schuler, Officers of the Indiana State Police, and various Special Agents of Department of Law Enforcement, Division of Criminal Investigation, State of Illinois are material witnesses in relation to this charge.

/s/ James J. McGivney

James J. McGivney
Special Agent, Drug Enforcement Administration

Sworn to before me, and subscribed in my presence, July 28, 1981.

/s/ John Paul Godich
John Paul Godich
United States Magistrate

Your affiant is a Special Agent of the Federal Drug Enforcement Administration and has been so employed for approximately 10 years.

1. That on July 27, 1981, your affiant obtained a search warrant for Room 150, Holiday Inn, State Route 231 and Interstate 74, Crawfordsville, Indiana. The said search warrant was obtained upon an affidavit, a copy of which is attached hereto marked Exhibit #1 and the facts contained therein are incorporated herein for purposes of this affidavit.

2. That your affiant and other special Agents of the Drug Enforcement Administration seized pursuant to the search warrant from Room 150, Holiday Inn, State Route 231 and Interstate 74, Crawfordsville, Indiana, approximately 4.5 pounds of a white powdery substance in three (3) separate containers. The white powdery substance was field tested and the chemical field test revealed a positive color reaction for the presence of Cocaine.

/s/ James J. McGivney
James J. McGivney, Special Agent
Drug Enforcement Administration

Sworn to before me, and subscribed in my presence, July 28, 1981.

/s/ John Paul Godich
John Paul Godich
U.S. Magistrate

United States District Court

FOR THE

SOUTHERN DISTRICT OF INDIANA

Docket No. IP—81

Case No. 147-M-0

UNITED STATES OF AMERICA	)	
	)	
vs.	)	AFFIDAVIT FOR
	)	SEARCH
Room 150, Holiday Inn	)	WARRANT
State Route 231 and	)	
Interstate 74	)	
Crawfordsville, Indiana	)	

BEFORE John Paul Godich, Indianapolis, Indiana

The undersigned being duly sworn deposes and says:

That he has reason to believe that (on the premises known as) motel room known as (sic) Room 150, located at the Holiday Inn, State Route 231 and Interstate 74, Crawfordsville, Indiana, being further described as a double room located within the Holiday Inn Hotel proper and having a door with the numbers 150 on it

in the Southern District of Indiana

there is now being concealed certain property, namely Cocaine, a Schedule II, narcotic drug controlled substance, Marihuana, instrumentalities, used in the possession with intent to distribute and distribution of cocaine and paraphernalia, books and records, and monies of the United States of America utilized in the possession with intent to distribute and distribution of cocaine which are being possessed with intent to distribute cocaine, a Schedule II narcotic drug controlled substance in violation of Title 21, U.S.C. 841 (a)(1), and 846.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

See Attached Affidavit

/s/ James J. McGivney
James J. McGivney, Special Agent
Drug Enforcement Administration

Sworn to before me, and subscribed in my presence, July 27, 1981.

/s/ John Paul Godich
John Paul Godich

Your affiant is a Special Agent of the Federal Drug Enforcement Administration and has been so employed for approximately 10 years.

1. That the information contained the following numbered paragraphs below is personally known to your affiant or has been personally told to your affiant by the individuals named in the numbered paragraphs below.

2. That on Thursday, July 24, 1981, your affiant was personally advised by a police officer known to him that the police officer had told him that an informant told the police officer of the activities of an individual identified by the informant as Douglas NISBET, a fugitive from justice.

3. That your affiant was personally told by the police officer that the informant had provided information to him and other police officers on at least three occasions in the past and that this information concerning criminal activities of persons had been independently corroborated by the police officer and other police officers.

4. That your affiant was personally told by the police officer that the informant personally told the police officer that Douglas NISBET was wanted on criminal

charges in the State of Illinois and that NISBET was a fugitive from the State of Illinois and using an assumed name.

5. That your affiant was personally told by the police officer that the police officer had personal knowledge of NISBET's fugitive status and pending charges in the State of Illinois.

6. That your affiant personally verified that NISBET was wanted on criminal charges in the State of Illinois through a check with the National Crime Information Center (NCIC) which revealed one Douglas NISBET to be listed on the following charges and warrants; (A) Unlawful delivery of a Controlled Substance and Failure to Appear, Warrant #78CF867, Champagne County, Illinois, dated 5/22/79, and B) Fleeing and Attempting to Elude the Police and Failure to Appear, Warrant #79T1057, dated 5/30/79 from Douglas County, Illinois. That your affiant personally observed copies of the aforementioned warrants and copies of the warrants are marked Exhibits A and B, and by that reference incorporated herein, as attached.

7. That your affiant was personally told by the police officer that a confidential informant advised him that NISBET would be in the area of Crawfordsville, Indiana, during the period 7/26/81 through 7/28/81.

8. That your affiant, police officer, and other officers established surveillance in the area of Crawfordsville, Indiana, July 27, 1981, at approximately 12:00 noon, and determined through a check with the records of the Holiday Inn located at State Route 231 and Interstate 74, Crawfordsville, Indiana, that an individual utilizing the name of L. JONES, Sunrise, Florida, was registered at the Hotel with a second individual. JONES was assigned Room 150 in the said Holiday Inn.

9. That your affiant and the police officer knew from prior investigations that NISBIT had been registered

in other hotels under the name of L. JONES of Sunrise, Florida.

10. On the afternoon of July 27, 1981, at the Holiday Inn, located at State Room 231 and Interstate 74 in Crawfordsville, Indiana, your affiant, S/A Tony H. King, and the police officer observed NISBET in the area of the hotel and identified him from a photograph taken at the time of NISBET's arrest on the outstanding warrants previously set forth above in this affidavit. A copy of that photograph is marked Exhibit C attached hereto and by that reference incorporated herein. That your affiant, S/A King and the police officer observed NISBET to enter Room 150 of the Holiday Inn at State Route 231 and Interstate 74, Crawfordsville, Indiana.

11. That your affiant and other officers established surveillance of Room 150 of the Holiday Inn, State Route 231 and Interstate 74, Crawfordsville, Indiana, and Detective McClain, Indiana State Police, observed an individual later identified as Larry D. JONES, exit Room 150, and enter a 1978 Buick Electra, license number Illinois 496243 and retrieve an unidentified object. Detective McClain personally told your affiant that JONES then returned to Room 150.

12. That your affiant and other officers knocked on the door of Room 150 utilizing a ruse, and after NISBET opened the door the affiant and other officers identified themselves as police officers.

13. NISBET then attempted to strike your affiant with a large tray and your affiant parried the blow with a shotgun and NISBET and JONES were subdued and arrested.

14. That your affiant then performed a protective sweep of Room 150 and observed a brown suitcase, opened and containing a quantity of U.S. Currency, a bottle of Mannitol, a cutting agent used in diluting Cocaine, a scale, a box of zip lock plastic bags and a brown paper bag containing several clear plastic bags

each containing a white powder substance. Your affiant further observed a quantity of a substance he believed through his training and experience to be Marihuana located on a chair situated between the two beds in Room 150.

15. That your affiant through his training and experience knows the appearance and packaging of cocaine and knows that Mannitol is utilized as a cutting agent to dilute cocaine before it is weighed and packaged in clear plastic zip lock bags as observed in the room.

16. That your affiant field tested the white powder substance which he observed in open view in the previously mentioned brown suitcase located in Room 150 and the field test revealed a positive color reaction for the presence of cocaine. That after the arrest of NISBET and JONES, you affiant examined the wallet of JONES to identify him and discovered an Illinois Certificate of Title for the previously described Blue Buick Electra, Vehicle Identification Number 4U69K88531324, Illinois license number 496243, released by the previous registered owner by signature.

17. That your affiant and other officers subsequently secured the room, sealed it, and are maintaining security on the room and automobile.

18. The automobile heretofore described as a 1978 Buick Electra was at all times located in a parked condition immediately outside of Room 150.

19. Because of the aforementioned facts, your affiant requests that if a warrant to search is issued that your affiant be allowed to search the premises and automobile during any time of the day or night.

/s/ James J. McGivney

James J. McGivney, Special Agent
Drug Enforcement Administration

Sworn to before me, and subscribed in my presence, July 27, 1981.

/s/ John Paul Godich

John Paul Godich
U.S. Magistrate

ATTACHMENT FOR CONTEMPT OF COURT

IN THE CIRCUIT COURT
OF CHAMPAIGN COUNTY
(Sixth Judicial Circuit)

The People of The State of Illinois	)	
vs.	)	No. 78-CF-867
Douglas M. Nisbet	)	

The People of the State of Illinois, to the Sheriff of Champaign County—GREETING:

WE COMMAND YOU TO TAKE Douglas M. Nisbet, Box 41, Tolono and him safely keep, so that he be and appear before the Circuit Court of Champaign County forthwith at the Court House in Urbana, in said County, to answer the People of the State of Illinois, and to show cause, if any he has, why he should not be adjudged to be in contempt of this Court, for failure to appear in the case of The People of the State of Illinois vs. Douglas M. Nisbet. And have you then and there this Writ.

Bond fixed in the sum of $50,000.00.

WITNESS, BETTY J. MALLOW, Clerk of said Court, and the Seal thereof, at Urbana, in said County, this 22nd day of May, A.D. 1979.

/s/ Betty J. Mallow, *Clerk*

THE SIXTH JUDICIAL CIRCUIT COURT
DOUGLAS COUNTY, TUSCOLA, ILLINOIS

STATE OF ILLINOIS — CIRCUIT COURT
COUNTY OF DOUGLAS — CASE NO. 79-T-1057
City of Tuscola — ARREST WARRANT

THE PEOPLE OF THE STATE OF ILLINOIS
TO ALL PEACE OFFICERS IN THE
STATE-GREETING:
YOU ARE HEREBY COMMANDED
forthwith to arrest

Defendant's Name Douglas M. Nesbit, P.O. Box 542

Address Mahomet, Illinois 61853

For the offense of Fleeing or attempting to elud (sic) police in violation of Section 11-204A of Chapter 95½ of the Illinois Revised Statutes of said State, or city, or village ordinance, and without any unnecessary delay, bring him before this court, or in the absence or inability of this court to act, the nearest or most accessible court in said county, or most accessible judge in the county where the arrest is made, to answer to the People of the State of Illinois on said charge and abide such further order as may be made concerning him.

ISSUED in said Douglas County and State this

30th day of May A.D., 1979

Bail fixed at $1,000.00 _____

ten percent rule to apply. JUDGE-MAGISTRATE

Circuit Court Case

No. 79-T-1057

Circuit Clerk's Use Only

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

DEFENDANT Douglas M. Nesbit
ADDRESS P.O. Box 542, Mahomet, Illinois 61853

CITY &
STATE _____

WARRANT Originating Dept.
or Mun. No. _____

Executed the within Warrant by reading the same to and arresting the within named defendant and bring him into court before

_____

this _____ day of _____ A.D. 19___

FEES FOR SERVICE (SHERIFF)

Service ..... $_____
Mileage ..... $_____
Return ..... $_____
TOTAL ..... $_____
Peace Officer .....

COURT LOCATION _____

_____

SUGGESTED COURT DATES _____

_____

COURT DATE SET _____

BOND POSTED: ☐ YES ☐ NO
Type of Bond Posted: ☐ Full Amount ☐ 10%
☐ Personal Recog. ☐ Real Estate
☐ Operator's License No. _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. IP 81-76-CR
	)	
DOUGLAS NISBET,	)	
LARRY D. JONES,	)	
	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANTS' MOTION TO SUPPRESS

Defendants, Douglas Nisbet and Larry D. Jones, having moved to suppress evidence in the above-captioned cause and having appeared in person and by counsel at an evidentiary hearing conducted by this Court on September 22, 1981, and the Court having considered the Motions, the evidence adduced at the hearing, the briefs and arguments of counsel and being fully informed in the premises, does HEREBY Find and Conclude as follows:

FINDINGS OF FACT

1. On or before July 27, 1981, Defendants Nisbet and Jones had rented and were occupying Room 150 at the Holiday Inn located on State Route 231 and Interstate 74, Crawfordsville, Montgomery County, Indiana.

2. Defendant Nisbet, at the time he occupied Room 150 of the Holiday Inn, was wanted by the State of Illinois on charges and warrants for (A) unlawful delivery of a controlled substance and failure to appear, and (B) fleeing a police officer and failure to appear.

3. Police officers, including federal agents, arrived at the Holiday Inn approximately Noon on July 27, 1981, and began a surveillance of the defendants shortly thereafter which resulted in a positive confirmation of the Defendant Nisbet's identify at approximately 3:30 p.m.

4. On the basis of the outstanding arrest warrants from the State of Illinois, at approximately 5:00 p.m. Federal Drug Enforcement Administration agents placed Nisbet under arrest by announcing to Nisbet when he opened the door of the motel room in answer to the agents' knock that they were police officers and that he was under arrest.

5. The Defendant Nisbet resisted arrest by attempting to strike the agents with a large tray, prompting the agents to parry the blow with a shotgun, and Nisbet fell back into the room, where the Defendant Jones was also located on the floor, and the agents entered to subdue and arrest the defendants.

6. The DEA agents, in particular, Special Agent James J. McGivney, having entered the motel room to subdue and arrest the defendants, discovered in plain view during the course of his protective sweep of the room a brown suitcase, opened and containing a quantity of U.S. currency; a bottle of Manitol, a cutting agent used in diluting cocaine; a scale; a box of zip lock plastic bags; a brown paper bag containing several clear plastic bags each containing a white powder substance; and a quantity of marijuana, all of which Special Agent McGivney, through his training and experience, recognized to be paraphernalia of illegal trafficking in controlled substances, which opinion was in part thereafter confirmed by a field test he conducted of the white powder substance proving it to be cocaine.

7. After arresting both defendants, each was fully apprised of his Constitutional rights per the Miranda-type warning read to them by Drug Enforcement Agents and each evidenced an understanding of those rights by making verbal acknowledgements signifying that they understood.

The statements thereafter made by the defendants to the agents resulted from a knowing and voluntary waiver of their rights.

8. After the arrests, the motel room was sealed and secured pending the securing of a search warrant. The search of the room and the 1978 Buick Electra and seizures of evidence therefrom which followed were judicially authorized per the search warrant issued by Magistrate John Paul Godich on July 27, 1981.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court concludes:

1. The arrests of the defendants were legally valid arrests, there having been no improper delay in their being effected and there having been probable cause to believe they had committed offenses.

2. The initial entry by police officers and agents into the motel room was necessitated by Nisbet's improperly resisting a valid arrest. Thus, Special Agent McGivney, having been drawn into the room to subdue Nisbet and complete and arrest, was entitled to make a protective sweep of the premises and to notice items in plain view, which thereafter could and did form a basis for obtaining a search warrant. The field testing of the substance found in the room at this time did not constitute a legally impermissible search. The subsequent seizure of evidence from the motel room and automobile was judicially authorized by virtue of the search warrant.

3. The Miranda warnings given the defendants at the time of their arrests were legally complete and proper, were understood by the defendants, and knowingly and voluntarily waived prior to their making statements to the agents.

4. The evidence seized from and the statements given by the defendants accordingly are not suppressible and the Motions to Suppress are denied.

Dated this 27th day of October, 1981.

/s/ S. HUGH DILLIN

S. HUGH DILLIN, Judge
U.S. District Court

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No. 82-1461

In the Supreme Court of the United States

OCTOBER TERM, 1982

LARRY D. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the entry by law enforcement officers into a motel room petitioner shared with a co-defendant, in the course of arresting the co-defendant, violated petitioner's Fourth Amendment rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A26) is reported at 696 F.2d 479. The opinion of the district court (Pet. App. A42-A45) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A2) was entered on December 14, 1982. A petition for rehearing was denied on January 21, 1983 (Pet. App. A1). The petition for a writ of certiorari was filed on March 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner and co-defendant Douglas Nisbet were convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21

U.S.C. 846 (Count I) and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count II).[1] Petitioner was sentenced to concurrent terms of two years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App. A3-A26).

1. Prior to trial, petitioner and co-defendant Nisbet moved to suppress evidence seized by law enforcement officers from a motel room that petitioner and Nisbet had occupied (Pet. App. A28-A30). The evidence at the suppression hearing showed that on July 24, 1981, DEA Agent James McGivney learned from Illinois State Agent Frank Waldrup about outstanding Illinois arrest warrants charging co-defendant Nisbet with failure to appear in connection with narcotics violations and with fleeing and attempting to elude the state police (Tr. 6, 10-13; Pet. App. A36, A39-A40).[2] Agent McGivney also learned that an informant had advised Agent Waldrup that Nisbet would be in the area of Crawfordsville, Indiana, between July 26 and July 28, carrying a large quantity of cocaine (Tr. 38-39, 45, 47, 87; Pet. App. A36). On the following day, Agent Waldrup gave Agent McGivney a two-year-old photograph of Nisbet and copies of the unexecuted warrants, the existence of which Agent McGivney confirmed through the National Crime Index Computer System (Tr. 12-14).

On July 27, 1981, Agents McGivney and Waldrup met with Illinois and Indiana law enforcement officers in Crawfordsville to plan Nisbet's arrest (Tr. 14-16). At approximately the same time, DEA Agents King and Casey went to a Holiday Inn at Crawfordsville (Tr. 16-18). There, at about noon, they saw a man fitting Nisbet's description near the

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[1]Co-defendant Nisbet was also convicted of assaulting federal officers, in violation of 18 U.S.C. 111 (Count III).

[2]"Tr." refers to the transcript of the suppression hearing.

swimming pool (Tr. 84). Agents McGivney and Waldrup subsequently arrived at the motel (Tr. 16-18). McGivney learned through motel registration records that Room 150 was registered to "L. Jones" for two persons. At about 1:15 p.m., the man fitting Nisbet's description went to Room 150 (Tr. 20). At 1:30 p.m., Agent McGivney, with the motel manager's consent, sent Agent King dressed as a busboy to Room 150 to deliver a large quantity of food that had been ordered (Tr. 21-22, 85). After the delivery, King reported that he saw two men, one matching Nisbet's description, inside the room. He also reported seeing drug paraphernalia (Tr. 22, 86-87).

At approximately 3:30 p.m., Agent King returned to the room as a busboy to attempt to retrieve the food tray (Tr. 63-64, 94). King was not given the tray, but was able for the first time positively to identify one of the men as Nisbet (Tr. 64, 101).

At 5:30 p.m., the arrest team followed Agent King to Nisbet's room (Tr. 23, 87-88). Agent King knocked on the door and stated that he had come to pick up the food tray because he was going off duty (Tr. 23-24, 88). When Nisbet opened the door with the tray in hand, Agent King announced: "Police. You are under arrest" (Tr. 24, 88-89). Nisbet responded by throwing the articles on the tray at Agent King. By this time, Agent McGivney was at Agent King's side. Nisbet proceeded to swing the tray at both agents. Agent McGivney blocked the tray with his shotgun, causing the gun to discharge (Tr. 24, 91-92). Nisbet and petitioner, the other occupant in the room, fell to the floor wounded (Tr. 25, 35, 69-70, 92). The agents then entered the room, arrested Nisbet and petitioner and removed them to the lawn outside the room (Tr. 6, 25-26, 70).

While the two men were being handcuffed, Agent McGivney conducted a protective sweep of the room (Tr. 26). At that time he discovered in plain view two plastic bags

containing green vegetable matter believed to be marijuana, white powder on the top of the television, and an open suitcase containing zip-lock bags of white powder, cutting agents and packaging materials (Tr. 7, 72-73). The room was secured while Agent McGivney obtained a search warrant (Tr. 8-9, 31). The subsequent search revealed several packets of cocaine and drug paraphernalia (Tr. 7-9).

2. In denying petitioner's motion to suppress, the district court concluded that the entry into the room was "necessitated by Nisbet's improperly resisting a valid arrest" (Pet. App. A44). The court further concluded that Agent McGivney "was entitled to make a protective sweep of the premises" once he was drawn into the room to subdue Nisbet and complete the arrest (*ibid.*).

The court of appeals affirmed (Pet. App. A3-A26). The court held that the arresting agents had probable cause to arrest both petitioner and co-defendant Nisbet (*id.* at A8-A11), and that the entry into the motel room satisfied the requirements of the Fourth Amendment, as interpreted by this Court in *Payton* v. *New York*, 445 U.S. 573 (1980), because the agents relied upon the outstanding arrest warrants for co-defendant Nisbet (Pet. App. A11-A12). In addition, the court of appeals expressed agreement with the district court that the entry also was justified by exigent circumstances (*id.* at A12 n.7):

> The sequence of events surrounding the arrest also indicates that [petitioner's] and Nisbet's right to be free from unreasonable searches was not violated. Agent King knocked on the door of room 150 and announced that he was a bus boy. When Nisbet opened the door, King displayed his badge and announced that Nisbet was under arrest. The agents did not enter the room until Nisbet began struggling with them. During the struggle, Nisbet fell back into the room where he was

> subdued. Then, [petitioner] was discovered and arrested, and Agent McGivney conducted a brief "protective sweep" of the premises.

Finally, the court of appeals rejected the argument that the agents were constitutionally compelled to obtain a telephonic search warrant before conducting the protective sweep of the motel room in the course of arresting petitioner and Nisbet (*id.* at A12-A13).

ARGUMENT

1. In the course of subduing and arresting co-defendant Nisbet, federal and state law enforcement officers entered the motel room that petitioner shared with Nisbet. Both courts below correctly rejected petitioner's Fourth Amendment contentions, concluding that the entry into the motel room was justified by the exigent circumstances occasioned by Nisbet's assault upon the arresting agents.

Petitioner contends (Pet. 5-11), however, that the officers' actions violated the arrest warrant requirement established by this Court in *Payton* v. *New York*, 445 U.S. 573 (1980).[3] He first argues that the Illinois arrest warrants for Nisbet were constitutionally inadequate under *Payton* because Indiana law apparently does not authorize its police officers to execute arrest warrants that have been issued in another state. He then argues that, under *Payton*, it was improper for the officers to employ a ruse to cause Nisbet to open the door of the motel room so that they

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[3]Contrary to petitioner's suggestion (Pet. 5, 11), *Steagald* v. *United States*, 451 U.S. 204 (1981), is inapposite. In *Steagald*, this Court held that, absent consent or exigent circumstances, law enforcement officers must obtain a search warrant before they may enter a *third party's* home to arrest the subject of an arrest warrant. In the instant case, petitioner shared the motel room with Nisbet, who was the subject of the arrest warrants. Accordingly, the arrest warrant rule of *Payton* applies.

could place him under arrest on the basis of probable cause.[4]

Petitioner's arguments are without merit. Although we believe that the *Payton* arrest warrant requirement was clearly satisfied by the Illinois warrants (see page 9, *infra*), there is no need even to consider that issue because the *Payton* rule is not at all implicated by the officers' actions here.

We submit that *Payton* does not extend to the situation in which officers possessing probable cause but no warrant, by ruse or show of force, cause a suspect to open the door of his house, thereby placing himself in a position to be arrested without any entry into the premises. In our view, such a situation is governed by the principles of *United States* v. *Watson*, 423 U.S. 411 (1976), and *United States* v. *Santana*, 427 U.S. 38 (1976), upholding warrantless probable cause arrests that do not require an entry into the home, rather than by *Payton*. The gist of *Payton* is not that the home is a sanctuary against warrantless arrests, but rather that the *search* of the home resulting from an arrest entry implicates an independent interest deserving of some form of warrant protection. Accordingly, if an arrest can be effectuated without an entry into the home, the policies served by the decision in *Payton* are not implicated.

Based on the foregoing principles, we submit that the officers' use of a ruse to cause Nisbet to open the door of the motel room was permissible under the Fourth Amendment.

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[4]Petitioner does not contest the existence of probable cause to arrest Nisbet. The record shows that even apart from the outstanding Illinois arrest warrants for Nisbet, the officers were aware that a previously reliable informant had stated that Nisbet would be in Crawfordsville and would have with him a large quantity of cocaine. The informant's account was corroborated by Nisbet's presence at the motel in Crawfordsville, and by the observation of drug paraphernalia in the motel room.

Once Nisbet appeared at the door and exposed himself to public view, the agents were entitled to attempt to arrest him at the doorway. See *United States* v. *Santana, supra; United States* v. *Botero*, 589 F.2d 430 (9th Cir. 1978), cert. denied, 441 U.S. 944 (1979). As the court of appeals concluded (Pet. App. A12 n.7), "[t]he agents did not enter the room until Nisbet began struggling with them." In response to the exigent circumstances created by Nisbet's efforts to resist arrest, it was perfectly reasonable for the officers to enter the motel room to subdue Nisbet and complete the arrest.

Petitioner contends (Pet. 9-10) that the decision below conflicts with the Ninth Circuit's decision in *United States* v. *Johnson*, 626 F.2d 753 (1980), aff'd on another ground, No. 80-1608 (June 21, 1982). In *Johnson*, Secret Service agents who had probable cause but no warrant to arrest Johnson, went to Johnson's house, knocked on the door, and identified themselves by fictitious names. When Johnson opened the door, the agents, who had their guns drawn, asked Johnson whether they could talk to him. Johnson permitted the agents to enter the house and gave an incriminating statement to the agents. The court of appeals held that Johnson had been arrested as he stood in the doorway and was confronted by the agents with their guns drawn. 626 F.2d at 757. Distinguishing the doorway arrest from those in *United States* v. *Santana, supra*, and *United States* v. *Botero, supra*, because Johnson did not voluntarily expose himself to public view but rather was induced to open his door through the use of a ruse, the court concluded that it is the location of the arrested person, and not that of the arresting agents, that determines whether an arrest occurs "within" a home under *Payton*. In addition, the court expressed its belief that Johnson's invitation to the agents to enter his home was not voluntary in light of the "coercive effect" of the weapons brandished by the agents.

For the reasons discussed above, we submit that the court of appeals in *Johnson* clearly erred in ruling that *Payton* prohibits police officers from causing a suspect, by means of a ruse, to appear at the doorway of his home so that they can arrest him on probable cause without entering the premises. Moreover, we seriously doubt that the Ninth Circuit will continue to adhere to that ruling.[5] In any event, *Johnson* involved an actual entry into the suspect's home in the course of arresting him; accordingly, the court's discussion concerning the use of a ruse was not essential to its decision. Because the entry in *Johnson* was held to have been justified neither by consent nor by exigent circumstances, it is distinguishable from the instant case, in which both courts below have determined that the actual entry into the motel room was necessitated by exigent circumstances arising from Nisbet's forcible resistance to his arrest. Furthermore, unlike the defendant in *Johnson*, who was himself induced to open the door as a result of the ruse, petitioner cannot assert that his own legitimate expectations of privacy were infringed by the officers' use of deceptive means to cause co-defendant Nisbet to open the door and expose himself to the officers' view. As already noted, the agents did not actually enter the room until after Nisbet began to resist the arrest.

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[5]Indeed, in *United States* v. *Martin*, No. 81-1402 (July 1, 1982), slip op. 3-4, a panel of the Ninth Circuit upheld the use of a ruse in order to induce the defendants to exit a motel room so that they could be arrested. The court noted that the defendants' reliance on *Payton* and *United States* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978), was unavailing "because those cases require an officer to obtain a warrant in order to enter a suspected felon's home in order to arrest the felon. Although the officers who arrested Martin and Campos had no warrant (and neither appellant contends that the officers lacked probable cause for arrest), the arrests were executed when Martin and Campos were leaving the motel room." Slip op. 4.

2. In any event, the Illinois arrest warrants were constitutionally sufficient to permit the officers to effect an arrest entry inside the motel room. In *Payton* (445 U.S. at 602-603) this Court observed that an arrest warrant requirement

> will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Petitioner does not suggest that the arrest warrants in this case were not issued by "a detached magistrate" upon a determination of probable cause. Nor does he contend that the agents lacked reason to believe that Nisbet, the subject of the warrants, was within the motel room. Rather, he contends (Pet. 5-6) that the Illinois arrest warrants could not properly be executed in Indiana. But the federal constitutional question whether a state warrant is sufficient under the Fourth Amendment to permit an officer to effect an arrest entry ought not to turn on whether the warrant complies in all respects with the particular technical requirements of state law. Here, the warrants embodied a determination by a neutral magistrate that there was probable cause to arrest Nisbet on criminal charges. This was sufficient to satisfy the warrant requirement of the Constitution.

3. Petitioner contends (Pet. 12-15) that his Fourth Amendment rights were violated because the officers entered the motel room without first obtaining a telephonic

search warrant, pursuant to Rule 41(c)(2) of the Federal Rules of Criminal Procedure. As we have already shown, however, the entry into the motel room was justified by the arrest warrants for Nisbet and by the exigent circumstances surrounding Nisbet's arrest. Although the court of appeals noted that the agents had probable cause to search the room at least two hours prior to the initial entry and that a telephonic warrant in all likelihood could have been obtained (Pet. App. A13-A14), the court nevertheless correctly concluded (*id.* at A12) that "a search warrant was [not] constitutionally compelled in this case." Petitioner's contention (Pet. 14) that "the telephonic warrant procedures are mandatory" is simply incorrect. Nothing in Rule 41(c)(2) requires government agents to obtain a telephonic warrant when a warrant is not required by the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1983

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No. 82-1461

In the

Supreme Court of the United States

OCTOBER TERM, 1982

LARRY D. JONES,
Petitioner,
v.
UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE PETITIONER IN REPLY

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an Illinois arrest warrant has any extra-territorial effect so that federal law enforcement officers may rely upon it and enter a motel room in Indiana without otherwise obtaining a warrant as required by *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981)?

2. Whether federal law enforcement officers may employ a ruse in entering a motel room to make an arrest and thereby avoid the necessity of obtaining a warrant as otherwise required by *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981)?

3. Whether Rule 41(c)(2) of the Federal Rules of Criminal Procedure is mandatory and requires federal law enforcement officers to obtain a telephonic search warrant when they do not have time to obtain a warrant by appearing personally before a magistrate?

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BRIEF OF THE PETITIONER IN REPLY

The primary effect of the government's brief in opposition is to emphasize the importance of granting certiorari.

The government first contends that police officers should be authorized to employ a ruse to arrest a person in his home or place of abode. This position is directly contrary to the decision of the Ninth Circuit in *United States v. Johnson*, 626 F.2d 753 (1980). Recognizing this fact, the

government suggests that *Johnson* is incorrect and should be overruled. Furthermore, the government speculates that the *Johnson* decision will probably be rejected even by the Ninth Circuit. *United States v. Martin*, an unpublished decision of the Ninth Circuit which was filed on July 1, 1982, is cited in support of this speculation.[1] Because *Martin* was not published, it may not be considered in determining the continued validity of the *Johnson* rule.

Assuming that the facts of the *Martin* case are as stated in the government's brief, however, those facts are distinguishable from the facts here. In *Martin*, the ruse caused the defendants to leave their home and their arrest was then effected in a public place. Here, however, the door to the petitioner's room was opened because of the ruse and the federal agents then entered to arrest him.

In any event, the *Martin* decision underscores the need for this Court to decide whether law enforcement officers may employ a ruse to avoid the effect of the Court's decisions in *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981).

A ruse was also used in the case of *United States v. Everroad*, 704 F.2d 403 (8th Cir. 1983). As stated by the court,

> "After Bragg's arrest, several other agents moved to apprehend Everroad at the Regency Motel. The agents learned from the motel clerk that the blue Datsun belonged to a man named Everroad who had checked into the motel that morning. The agents persuaded the motel clerk to make a hoax call to Everroad, informing him that his car had been involved in an accident and requesting him to come to the lobby. When Everroad stepped out of his room, the agents—without a warrant—arrested him at gunpoint."

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[1] *See, Table*, at 685 F.2d 448.

Everroad's conviction was reversed on other grounds and the Eighth Circuit did not consider the effect of the ruse. Nevertheless, it presents a third example of a case involving a ruse and emphasizes the need for an authoritative interpretation of the meaning of the *Payton* and *Steagald* cases with reference to such police tactics.

The government suggests that the basic issues in the petitioner's case need not be addressed because this is a case in which exigent circumstances excused the necessity of obtaining a warrant. This suggestion should be rejected for two reasons. First, neither the District Court nor the Court of Appeals found that any such exigent circumstances existed. Second, any such finding would be improper under the facts of the case,[2] because there was no explanation of why the agents employed the ruse instead of obtaining a warrant when they went to the room. Since the ruse improperly caused the door to be opened, the resulting struggle and arrests were therefore clearly illegal. Furthermore, federal agents are not permitted to create the "exigent circumstances" which are then supposedly relied upon to excuse the necessity for obtaining a warrant.

The government also contends that an Illinois arrest warrant is sufficient to authorize law enforcement officers to make an arrest in an Indiana motel room.[3] This contention is contrary to the fundamental rule that an arrest warrant has no extra-territorial validity.

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[2] The Court of Appeals did include a footnote to its opinion which discussed the entry into the petitioner's room, but this was not a finding of exigent circumstances as suggested in the government's brief. (Respondent's brief, p. 4.) In fact, the court could not have made such a finding because the alleged struggle at the doorway did not occur until *after* the federal agents had employed their ruse to get the petitioner's door open.

[3] As noted in the government's brief, the petitioner does not contest the existence of probable cause to arrest his co-defendant Douglas Nisbet. (Respondent's brief, p. 6 n. 4.) Petitioner does, however, reject the

(Footnote continued on page 4)

Furthermore, it emphasizes the uncertainty that has existed on this point throughout this case. At the trial, the government maintained that the federal agents properly relied upon the arrest warrant to enter the petitioner's motel room. Thereafter, the government conceded that the warrant was not sufficient to authorize the *entry* and argued on appeal that the federal agents acted as private citizens when they executed the warrants and arrested the petitioner and his co-defendant. Now the government is reverting to its original argument, and certiorari should be granted to consider whether the fundamental rule that arrest warrants have no extra-territorial validity should be changed.

The government also suggests that the petitioner has no standing to object to the ruse because the co-defendant is the one who opened the door. (Respondent's brief, p. 8.) This argument was not raised at the trial or in argument to the Court of Appeals and cannot be raised for the first time on certiorari. Furthermore, it ignores the facts that the motel room was registered in the petitioner's name and that the ruse was directed against both of the occupants of the room. The ruse was improper, and because the petitioner's arrest was a direct result of the ruse, it was equally improper.

Finally, the government contends that the petitioner is incorrect in asserting that the telephonic warrant procedures[4] are mandatory. This position conflicts with the decisions of four circuit courts of appeal. *See, United States*

(Footnote 3 continued

government's suggestion that there was probable cause for Nisbet's arrest "even apart from the outstanding Illinois arrest warrants". In fact, the government expressly conceded at trial that the only probable cause for Nisbet's arrest was the Illinois warrant. It further conceded that the agents relied exclusively upon this warrant to justify their entry into the petitioner's motel room. (Petition for Certiorari, p. 6).

[4] Rule 41 (c)(2) of the Federal Rules of Criminal Procedure.

v. McEachin, 670 F.2d 1139, 1146-48 (D.C. Cir. 1981); *United States v. Jones*, 696 F.2d 479, 487 (7th Cir. 1982); *United States v. Cuaron*, 700 F.2d 582 (10th Cir., February 14, 1983); and *United States v. Hackett*, 638 F.2d 1179, 1184-85 (9th Cir. 1980). *And see, United States v. Baker*, 520 F.Supp. 1080, 1084 (S.D. Iowa 1981).

In *McEachin*, the court of Appeals for the District of Columbia Circuit stated that it was "troubled" by the "apparent ignorance" of the officers about the telephonic procedures and the failure of the government to introduce any evidence about the availability of the telephonic warrant. 670 F.2d at 1146. In *Cuaron*, the Tenth Circuit expressed concern because telephonic warrants were not "looked upon favorably" in the district. As stated by the court,

> "When Agent Moren was asked why the agents did not attempt to get a telephone warrant, he explained: 'We have discussed this before with the magistrates here. It's not really looked upon favorably...[T]o my knowledge, there has never been one in the judicial district...' Rec., vol. III, at 182. Congress has clearly authorized magistrates to issue telephone warrants and it intended that they do so. Failure to seek a telephone warrant merely because '[i]t's not really looked upon favorably' will not be excused. Were the situation here less exigent, we would not hestitate to hold the warrantless search of Cuaron's house invalid." 700 F.2d at 590.

In the petitioner's case, the Seventh Circuit expressed a similar concern when the government attorney stated in oral argument that the procedures were not followed in the Southern District of Indiana because of a policy of the United States Attorney's office. As stated by the Court:

> "...we are disturbed by the government's policy of not obtaining a telephone search warrant...." 696 F.2d at 487.

The government's brief also asserts the view of the Department of Justice that the procedures are not mandatory. As stated in the brief, "Petitioner's contention (Pet. 14) that 'the telephonic warrant procedures are mandatory' is simply incorrect." (Respondent's brief, p. 10.)

Certiorari should therefore be granted to enable the Court to issue an authoritative interpretation of Rule 41(c)(2), which is being misconstrued by law enforcement officers, magistrates, United States attorneys, and the Department of Justice.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully submits that his petition for certiorari should be granted.

Respectfully submitted,

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